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IN THE UNITED STATES COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 175

PETSONELLA MORAGNE, ETC.,

PETITIONER,

vs.

STATES MARINE LINES, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

APPENDIX

(Title omitted in printing)

(Filed: April 27, 1965)

COMPLAINT

The plaintiff, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, by and through her undersigned attorneys, files this her complaint in the above styled cause and alleges:

COUNT I

1. The plaintiff, PETSONELLA MORAGNE, is the duly qualified administratrix and personal representative of the Estate of EDWARD MORAGNE, SR., deceased, by virtue of appointment by the Honorable Harry G. McDonald, County Judge of Hillsborough County, Florida, on February 19, 1965.

2. At the time of the death of EDWARD MORAGNE, SR., the said PETSONELLA MORAGNE was the lawful wife of said deceased.

3. That this action is brought for the benefit of the said widow and the following named minor children who were born as a result of the marriage of plaintiff and deceased: Ellen Gail Moragne, aged 11 years, and Artest Frankie Moragne, aged 10 years.

4. That at all times hereinafter mentioned the defendant was and is a corporation organized and existing under and by virtue of the laws of a State other than the State of Florida, to wit, the State of New York, but said defendant was and is engaged in doing business in Tampa, Hillsborough County, Florida, and at all times hereafter mentioned defendant owned and operated the vessel SS PALMETTO STATE, which said vessel was at all times hereafter mentioned engaged in navigation and engaged in the carriage of cargo for hire on the high seas and in navigable waters of the United States.

5. That at all times hereafter mentioned, the deceased was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida, and was performing his regular duties as a longshoreman loading and unloading cargo aboard the vessel SS PALMETTO STATE, owned and operated by the defendant.

6. That on or about December 31, 1964, the deceased as a longshoreman, was lawfully on or about the said vessel SS PALMETTO STATE owned and operated by the defendant, performing his regular duties as a longshoreman when, as a proximate result of the wrongful act, negligence, carelessness and default of the defendant, a hatch beam in one of the vessel's cargo holds fell onto and against the deceased causing his death on December 31, 1964.

7. That said hatch beam fell onto and against the deceased at the time and place aforesaid because the defendant, STATES MARINE LINES, INC., by and through its owners, officers, agents, servants and employees did by its wrongful act, negligence, carelessness and default, carelessly or negligently fail to keep and maintain said vessel SS PALMETTO STATE, its equipment and appurtenances in a safe, sound and proper condition, free from hazards and fit for use by the deceased and other persons lawfully using the same in the following particulars:

(a) Defendant failed to inspect, find and discover all defects, improper and faulty construction and dangerous conditions in and upon said vessel, remedy or correct same, or warn, notify or inform the decedent of same, or did carelessly or negligently fail to provide adequate safeguards or methods for preventing grievous injury or loss of life to persons, including the decedent, who would be lawfully on or upon said vessel.

(b) Defendant failed to provide proper and adequate locking devices on the hatch beam which caused the death of the deceased.

(c) Defendant failed to keep the locking devices on the hatch beam, which caused the death of the deceased, in proper working order.

(d) Defendant failed to inspect and discover the fact that the locking devices on the said hatch beam were worn and did not function properly.

(e) Defendant failed to warn plaintiff's decedent or his employer of the improper and unsafe condition of the locking devices on said hatch beam.

8. As a proximate result of the foregoing acts of negligence on the part of the defendant, the deceased lost his life

and the said widow has lost and will be deprived of the support deceased would have given her during his natural life; and the said children have lost and been deprived of the support deceased would have given them during their minority; and the widow has lost and been deprived of the help of deceased in the rearing and guidance of said children; and the said children have lost the companionship, protection and society of their father during their minority; and said widow has incurred ambulance, hospital and funeral expenses.

COUNT II

9. Plaintiff reavers and realleges each and every allegation contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I of this complaint.

10. That the said hatch beam fell upon and killed the deceased at the time and place mentioned above because the SS PALMETTO STATE was unseaworthy in the following particulars:

(a) The locks on the said hatch beam were improperly manufactured or installed.

(b) The locks on said hatch beam were improperly maintained.

(c) The locks on said hatch beam were loose and worn and failed to function properly.

(d) The locks on said hatch beam were not locked at the time of the accident alleged herein.

(e) The said hatch beam became loose from the hatch combing which was its proper place and fell to the deck of the hold striking the plaintiff's decedent.

11. As a proximate result of the unseaworthiness of the SS PALMETTO STATE as aforesaid, the decedent lost his life and the said widow has lost and will be deprived of the

support deceased would have given her during his natural life; and the said children have lost and been deprived of the support deceased would have given them during their minority; and the widow has lost and been deprived of the help of deceased in the rearing and guidance of said children; and said children have lost the companionship, protection and society of their father during their minority; and the said widow has incurred ambulance, hospital and funeral expenses.

COUNT III

12. Plaintiff reavers and realleges each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count I of the complaint.

13. As a proximate result of the foregoing acts of negligence on the part of defendant, plaintiff's decedent suffered severe and excruciating mental and physical pain and anguish prior to his death.

COUNT IV

14. Plaintiff reavers and realleges each and every allegation contained in paragraphs 9 and 10 of Count II of the complaint.

15. As a proximate result of the unseaworthiness of the SS PALMETTO STATE, plaintiff's decedent suffered severe and excruciating mental and physical pain and anguish prior to his death.

WHEREFORE, the said plaintiff claims damages from the defendant on each count in an amount in excess of One Thousand ($1,000) Dollars and respectfully requests a trial by jury of all the issues in this cause.

(Signature omitted in printing)

(Title omitted in printing)

(Filed: July 19, 1966)

PETITION FOR REMOVAL

The petition of States Marine Lines, Inc., defendant in the above-styled case, represents to the Court:

1. This civil action was brought and is now pending in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

2. This action was commenced in said Circuit Court on June 28, 1966, by the filing of a complaint, a true copy of which is attached hereto, marked Exhibit A, and by reference made a part hereof.

3. Summons Ad Respondendum was issued from said Circuit Court to the defendant States Marine Lines, Inc., and thereafter on the 29th day of June, 1966, served on defendant States Marine Lines, Inc., a true copy of said Summons Ad Respondendum with the Sheriff's Return of Service thereon is attached hereto, marked Exhibit B, and by reference made a part hereof.

4. Said Complaint is the initial pleading setting forth the claim upon which the action is based and defendant first received a copy of said initial pleading in the aforesaid manner on said 29th day of June, 1966.

No other process, pleadings, or orders have been served by or upon defendant in the said action.

5. Said action is a civil action of which this Court has original jurisdiction under 28 USC § 1332 and is one that the defendant is entitled to remove to this Court pursuant to 28 USC § 1441 in that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs, the action is between citizens of different states and at the time of the

commencement of this action and at all times since defendant States Marine Lines, Inc., has been and still is, a corporation organized and existing under the laws of the state of Delaware which has its principal place of business in New York and plaintiff Petsonella Moragne has been and still is a citizen of the State of Florida. The defendant was not at the time of institution of said action, and is not now, a Florida corporation, nor is it a corporation having its principal place of business in Florida.

6. Defendant files herewith a bond with good and sufficient surety as the statute in such cases provides, conditioned as the law directs, that the defendant will pay all costs and disbursements incurred by reason of this removal proceeding, should it be determined that this case was not removable or was improperly removed.

7. Written notice of the filing of this Petition for Removal and Bond has been given to all parties herein, and a copy of this petition has been, this date, filed with the Clerk of the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida.

WHEREFORE, defendant prays that the above action now pending against it in the Circuit Court in and for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, No. 48282-L, hereby be removed from said State Court to this Court.

DATED July 19, 1966.

(Signature, verification, exhibits and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: July 20, 1966)

THIRD PARTY COMPLAINT

The Third Party Complaint of States Marine Lines, Inc., Defendant and Third Party Plaintiff, against Gulf Florida Terminal Company, Third Party Defendant, respectfully alleges upon information and belief as follows:

1. Plaintiff PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, has filed against Defendant, States Marine Lines, Inc., a Complaint, a copy of which is hereto attached as Exhibit A.

2. Defendant and Third Party Plaintiff has procured the removal of the Plaintiff's Complaint and the law suit of which it was the initial pleading to this Court.

3. At all material times Defendant and Third Party Plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Delaware and had its principal place of business in New York.

4. At all material times the Plaintiff was, and is, a citizen and resident of Hillsborough County, Florida.

5. At all material times Third Party Defendant, Gulf Florida Terminal Company, was, and is, a corporation organized and existing under the laws of the State of Florida with its principal place of business in Tampa, Florida.

6. At all material times Defendant and Third Party Plaintiff owned and operated the SS PALMETTO STATES.

7. The matter in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

8. At all material times, and prior to the happening of the matters alleged in the Complaint, Gulf Florida Terminal

Company had undertaken, for an agreed consideration, pursuant to a written contract with Defendant and Third Party Plaintiff, to perform in a workmanlike and safe manner certain stevedoring services on the SS PALMETTO STATE, at Tampa, Florida. The written contract just mentioned is attached hereto as Exhibit B and by specific reference made a part hereof.

9. When the SS PALMETTO STATE arrived at Tampa, Florida, on or about December 31, 1964, and prior to the accident alleged in the Complaint, Defendant and Third Party Plaintiff, through its officers and agents, delivered to Third Party Defendant, Gulf Florida Terminal Company, the custody and control of the main deck area, cargo spaces and cargo gear of said vessel, including the hatch or hold of the vessel in which Plaintiff's decedent was allegedly working at the time of the accident described in the Complaint. At the time of said delivery, the said main deck area, cargo spaces and cargo gear were clean, dry and in all respects seaworthy, safe and suitable for the working of cargo. Thereupon Gulf Florida Terminal Company undertook to perform the stevedoring services required.

10. Gulf Florida Terminal Company's agents and employees including Plaintiff's decedent, were on board the SS PALMETTO STATE to perform said stevedoring services pursuant to the contract aforementioned.

11. The stevedoring services and the stevedoring operations on board SS PALMETTO STATE on December 31, 1964, were under the exclusive control of Gulf Florida Terminal Company, its agents and employees.

12. If, at some time between the time Defendant and Third Party Plaintiff turned the vessel over the Third Party Defendant, and the time Plaintiff's decedent was injured, any condition arose to create a dangerous or unsafe working

condition or unsafe place to work, or if Plaintiff's decedent employed an unsafe manner of working, or if Plaintiff's decedent's fellow employees employed an unsafe manner of working, it was the duty of Third Party Defendant Gulf Florida Terminal Company to discover the unsafe or dangerous situation, condition or manner of working, and either to correct it or cause it to be corrected, or to halt work until the said condition, situation, or manner of working had been corrected, or do some or all of these things.

13. If Plaintiff's decedent was injured as alleged in the Complaint, and if Plaintiff's decedent, and Plaintiff, and the Parties on whose behalf it is alleged the Complaint was filed, suffered the injuries and damages alleged in the Complaint, all of which are denied, and if as a result of such alleged injuries and damages Defendant and Third Party Plaintiff is found liable to the Plaintiff, which liability Defendant and Third Party Plaintiff hereby denies, then any and all such liability was proximately caused by and proximately resulted from the fault or negligence of Gulf Florida Terminal Company, its agents or employees, in the following particulars, or some or all of them:

(a) In breaching its warranty of workmanlike service.

(b) In failing to properly supervise Plaintiff's decedent in his work.

(c) In failing to properly supervise Plaintiff's decedent's fellow employees in their work.

(d) In failing to conduct the necessary inspections of the vessel and its hatch covers, beams and cargo gear.

(e) In the negligent use of the equipment of the vessel provided to Gulf Florida Terminal Company for the discharging of the cargo of the vessel.

(f) In failing to furnish the requisite supervision of the discharge operation as a whole.

(g) In failing to bring to the attention of the vessel's personnel any condition requiring correction as to the hatches, holds, or cargo gear of the vessel, or the area in which Plaintiff's decedent was working.

(h) In failing to correct any defective condition with respect to the vessel's cargo gear, hatches, or holds, or area on the vessel in which Plaintiff's decedent was working.

(i) In failing to halt work in the area in which Plaintiff's decedent worked until any necessary corrections in the conditions of the vessel, its cargo gear, or work spaces had been made.

(j) In failing to perform the obligations resting upon it under the law, or under the contract for stevedoring services described above.

By reason whereof, Gulf Florida Terminal Company should idemnify Defendant and Third Party Plaintiff for any and all damages, costs, expenses and attorney's fees, Defendant and Third Party Plaintiff may be required to pay to the Plaintiff, or others, on account of or in consequence of the matters alleged in the Complaint.

14. Defendant and Third Party Plaintiff has been compelled to retain the law firm of Fowler, White, Gillen, Humkey & Trenam to defend it in this suit and is obligated to pay to said law firm its reasonable fees for services in this suit.

15. Defendant and Third Party Plaintiff is filing herewith its answer to the Complaint herein.

16. If the SS PALMETTO STATE was unseaworthy, as is alleged in the Complaint herein, which unseaworthiness is denied, then said unseaworthiness was brought into play by the fault or neglect of Third Party Defendant Gulf Florida Terminal Company, its agents or employees, in one or more of the particulars set out in Paragraph 13 above.

WHEREFORE, Defendant and Third Party Plaintiff States Marine Lines demands judgment against Third Party Defendant Gulf Florida Terminal Company for all sums that may be adjudged against said Defendant and Third Party Plaintiff States Marine Lines, Inc., in favor of the Plaintiff Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., deceased, and Petsonella Moragne, individually, together with costs, attorneys fees and expenses, or in the alternative, for all such sums as may reasonably be paid to the said Plaintiff in settlement of this matter, together with costs, attorneys fees and expenses, should the Plaintiff's claim be settled.

(Signature, exhibits and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: Sept. 6, 1966)

MOTION TO STRIKE COUNT II OF THE COMPLAINT

Third Party Defendant, GULF FLORIDA TERMINAL COMPANY, by and through its undersigned attorney, moves the Court to strike Count II of Plaintiff's Complaint on the ground that unseaworthiness as a basis of liability is not encompassed within the provisions of the statutory right of action for death under Florida law, §768.01, Florida Statutes.

WHEREFORE, Third Party Defendant prays that the Court enters its Order striking said Count from the Complaint.

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: Sept. 21, 1966)

ORDER DISMISSING WITH PREJUDICE COUNT II OF PLAINTIFF'S COMPLAINT

This cause came on for hearing upon the Second and Third Defenses contained in the Answer of the defendant, STATES MARINE LINES, INC., to Count II of the plaintiff's complaint. These defenses are in the nature of motions to dismiss in that they challenge Count II as failing to state a claim upon which relief can be granted.

In Count II plaintiff seeks damages for the wrongful death of a longshoreman killed in Florida waters aboard the defendant's vessel. The plaintiff's claim in Count II is grounded upon the Florida Wrongful Death Act, §768.01 Florida Statutes, 1963, and seeks to recover upon the theory of unseaworthiness. The defendant relies upon the prior holdings of the United States Court of Appeals for the Fifth Circuit in *Graham v. A. Luci, Ltd.*, 206 F. 2d 233 (5th Cir. 1953), and *Emerson v. Holloway Concrete Products Co.*, 282 F. 2d 271 (5th Cir. 1960) and says the Florida Wrongful Death Statute does not give rise to an action for death caused by unseaworthiness, and is not entitled to proceed on the theory of unseaworthiness and, therefore, that so much of Count II as states a claim based on unseaworthiness must be dismissed.

Plaintiff contends that the Florida Wrongful Death Act does encompass the substantive law of the Admiralty and cites a Florida Circuit Court decision *Lee v. Gulf Coast Transit Company*, 24 Florida Supplement 31 (1961). Plaintiff also relies on *M/V Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 1959 A.M.C. 813 (U.S. 1959); *Holley v. The Manfred Stansfield*, 269 F. 2d 317, 1959 A.M.C. 2189 (4th Cir. 1959); *Maryland ex rel Gladden v. Weyerhaeuser*

Steamship Co., 176 F. Supp. 664 (D.C. Md. 1959); *Maryland ex rel Smith v. A/S Nabella*, 176 F. Supp. 668 (D. C. Md. 1959); *Halecki v. United New York and New Jersey Sandy Hook Pilots Association*, 358 U.S. 613, 79 St. Ct. 517 (U.S. 1958); *Hess v. U.S.A.*, 361 U.S. 314, 80 S.Ct. 341, 4 L. Ed. 2d 305 (U.S. 1960); *Anthony v. International Paper Co.*, 289 F. 2d 574 (4th Cir. 1961); *Union Carbide Corp. v. Goett*, 278 F. 2d 319 (4th Cir. 1960); *Cunningham v. Rederiet Vindeggen A/S*, 333 F. 2d 308 (2nd Cir. 1964).

We hold, in view of the controlling decisions of the United States Court of Appeals for the Fifth Circuit in *Graham v. A. Luci, Ltd.*, supra, and *Emerson v. Holloway Concrete Products Co.*, supra, that the plaintiff is not entitled to proceed on the theory of unseaworthiness and that so much of the plaintiff's second count as states a claim based upon unseaworthiness must be dismissed and plaintiff relegated to her claim for damages for wrongful death based upon negligence.

It is, however, the opinion of this Court that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. It is, therefore:

ORDERED:

1. That Count II of plaintiff's complaint is hereby dismissed with prejudice, and

2. That it is the opinion of this Court that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order my materially advance the ultimate termination of this litigation.

DONE AND ORDERED at Tampa, Florida, this 21st day of September, 1966.

s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

(Title omitted in printing)

On Application for Interlocutory Appeal

Before RIVES, GEWIN and GODBOLD, Circuit Judges.

BY THE COURT:

Leave to appeal from the interlocutory order of the United States District Court for the Middle District of Florida entered September 21, 1966, in its Civil Action No. 66-258-CIV-T be, and the same is hereby GRANTED.

(ORIGINAL FILED — OCTOBER 28, 1966)

(Seal)
A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By s/ Eugenia S. McMurphy
Deputy
New Orleans, Louisiana
OCT 28 1966

(Title omitted in printing)

(Filed: Nov. 10, 1966)

NOTICE OF APPEAL

NOTICE is hereby given that plaintiff, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of this Court entered on September 21, 1966, dismissing with prejudice Count Two of Plaintiff's Complaint.

(Signature and certificate of service omitted)

(Title omitted in printing)

(Filed: March 9, 1967)

PORTION OF APPELLANT'S ORIGINAL BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Page 4)

POINT ON APPEAL

THE FLORIDA WRONGFUL DEATH ACT ENCOMPASSES THE SUBSTANTIVE LAW OF THE ADMIRALTY AND PERMITS THE RECOVERY OF DAMAGES FOR DEATH OF A LONGSHOREMAN KILLED IN NAVIGABLE WATERS OF THE STATE OF FLORIDA CAUSED BY THE UNSEAWORTHINESS OF A VESSEL.

ARGUMENT

The sole issue before this Court is an interpretation of the Florida Wrongful Death Act, F.S. 768.01 * * *

(Title omitted in printing)

(Filed: October 30, 1967)

PORTION OF APPELLANT'S REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Page 3)

(A) THE CHOICE OF LAW MANDATE FROM THE HARRISBURG TO THE TUNGUS:

We readily agree with the Appellee that the Federal Courts must take the State Law as they find it, including its limitations. This is precisely the point the Appellant has been arguing. The State Law obviously *does* incorporate this action. The Statute was intended to incorporate this action, and this Court should be bound by the State Law. * * *

(Title omitted in printing)

(Filed: April 28, 1967)

SUGGESTION FOR CERTIFICATION OF CONTROLLING QUESTION OF STATE LAW TO THE SUPREME COURT OF FLORIDA

Come now the Appellees, STATES MARINE LINES, INC., and GULF FLORIDA TERMINAL COMPANY, by and through their undersigned attorneys, and file this their Suggestion For Certification Of Controlling Question

Of State Law To The Supreme Court Of Florida, and state as follows:

1. The parties are agreed, and the briefs filed herein show, that the sole question presented by this appeal must be decided solely in accordance with Florida law. See, *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 3 L. Ed.2d 524, 79 S. Ct. 503 (1959). More specifically, the sole question presented by this appeal requires judicial construction and interpretation of the Florida Wrongful Death Act, Florida Statutes, §768.01.

2. The parties are agreed, and the briefs filed herein show, that there is no controlling Florida appellate decision deciding the specific question presented by this appeal.

3. In somewhat similar circumstances the United States Supreme Court in *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 3 L. Ed.2d 524, 79 S. Ct. 503 (1959), recommended the use of any available procedures by which a definitive decision from the state court might be obtained on the critical question involved. Thus, Justice Frankfurter said in his concurring opinion (3 L. Ed.2d at 531):

> ". . . [A]uthoritative construction should be sought under readily available state procedures, from the state court, while the case is held in the federal court."

State procedures are available under Florida law for obtaining an authoritative decision from the Florida Supreme Court in this case. See, Florida Statutes, §25.031; Rule 4.61, Florida Appellate Rules: *Green* v. *American Tobacco Company*, 154 So.2d (Fla. 1963).

WHEREFORE, the appellees respectfully suggest and request that this court enter its appropriate certificate certifying to the Supreme Court of Florida the following question:

"WHETHER THE FLORIDA WRONGFUL DEATH ACT, FLORIDA STATUTES, §§ 768.01-768-02, PERMITS A SUIT THEREUNDER BASED UPON ALLEGATIONS OF "UNSEAWORTHINESS" AS THE DOCTRINE OF UNSEAWORTHINESS IS KNOWN IN FEDERAL MARITIME LAW."

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: June 6, 1967)

SUGGESTION OF PENDENCY IN THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA OF THE CASE OF EDNA WEED vs. OWEN BILBREY, SR., ET AL, CASE NO. 7204, WHICH HAS AT ISSUE THE CONTROLLING POINT OF LAW OF THE CASE HEREIN IN DISPUTE BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

Comes now the appellant, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., and PETSONELLA MORAGNE, individually, and suggests to this Court as follows:

1. There is now pending before the Second District Court of Appeal of the State of Florida the case of Edna Weed, Appellant, vs. Owen Bilbrey, Sr., et al, Case No. 7204, which has at issue:

> "Whether the trial court erred in holding that the absolute defense of contributory negligence — rather than the partial admiralty defense of comparative negligence — was applicable in an action for wrongful death brought under the Florida

Wrongful Death Statute, where the suit was predicated upon a maritime tort commited on navigable waters within the State of Florida. (Raised by Assignments of Error 1-3, 5-8, 11; R. 228-229)."

The appellant is advised that oral argument has been held on that case and the written opinion of the Second District Court of Appeal of Florida is expected in the very near future.

2. The issue to be decided by the Second District Court of Appeal of Florida will be the first ruling on this point by an appellate court of the State of Florida.

3. That under the rule of *Erie Railroad Co. v. Tompkins*, 58 S. Ct. 817, 304 U.S. 64, 82 L. ed. 1188 (1938), the decision of the Second District Court of Appeal of Florida will be binding upon the Fifth Circuit Court of Appeals.

4. That appellant, therefore, respectfully suggests to this Court that all further proceedings on Case No. 24198, Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., deceased, and Petsonella Moragne, individually, vs. States Marine Lines, Inc., vs. Gulf Florida Terminal Company, should be withheld pending the outcome of the aforesaid case in the Second District Court of Appeal of Florida.

5. The appellant further suggests that because of the pendency of the Weed case in the Second District Court of Appeal of Florida that it would be unnecessary and inappropriate for this Court to certify the issues in this case to the Supreme Court of the State of Florida.

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: July 6, 1967)

Appeal from the United States District Court for the Middle District of Florida

Before BROWN, GOLDBERG and AINSWORTH, Circuit Judges.

BY THE COURT:

On consideration of the suggestions filed by appellees for certification by this Court of an alleged controlling question of State Law involved on this appeal to the Supreme Court of Florida,

and of the further suggestion of pendency by appellants that this Court should instead stay all further proceedings on this appeal pending the decision of the case of *Edna Weed vs. Owen Bilbrey, Sr., et al,* Case No. 7204 on the docket of the Second District Court of Appeals for the State of Florida,

IT IS ORDERED that Appellants' request for stay is denied as such since the case is taken off of the calendar under the certification to the Supreme Court of Florida; but the Appellees' suggestion for certification to the Supreme Court of Florida is granted.

It is further ORDERED that counsel are directed to collaborate in the preparation of an adequate petition complying with the rules of the Supreme Court of Florida since the question in the bare form quoted in the Appellees' motion is inadequate. See Hopkins v. Lockheed Aircraft, 5 Cir., 1966, 358 F.2d 347; see also The Life Insurance Company of Virginia v. Shifflet, 5 Cir., 1966, 359 F.2d 501, and the recent opinion of the Supreme Court of Florida, May 31, 1967, in that case No. 36160 (opinion May 31, 1967) which quotes in full the certificate as previously issued by this Court. The

Court expects counsel to be able to prepare a mutually satisfactory certificate, but in the event this proves to be impossible the papers should be submitted jointly showing the extent to which counsel are in agreement and furnishing the exact wording of the proposed portions as to which disagreement exists. A written memorandum may be filed in support of the views of any such differences. The certificate may be filed in typewritten form (original and 7 clear copies) and this should be done within 30 days after the receipt of a copy of this order.

(Title omitted in printing)

(Filed: Aug. 11, 1967)

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO §25.031 FLORIDA STATUTES 1965 AND RULE 4.61 FLORIDA APPELLATE RULES

TO THE SUPREME COURT OF FLORIDA AND TO THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit that there are involved in the above styled case in said Court questions or propositions of the laws of the State of Florida which are determinative of the said cause, and that there are no clear, controlling precedents in the decisions of the Supreme Court of the State of Florida. The said United States Court of Appeals for the Fifth Circuit therefore certifies such questions or propositions of State law, pursuant to §25.031 Florida Statutes, 1965, and Rule 4.61, Florida Appellate Rules, as follows:

(1) STYLE OF THE CASE:

The style of the case in which this Certificate is made is as follows:

Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., Deceased and Petsonella Moragne, individually, appellant, versus States Marine Lines, Inc., a corporation, Appellee, versus Gulf Florida Terminal Company, a corporation, Appellee, Case Number 24198, United States Court of Appeals for the Fifth Circuit, said case being an interlocutory appeal from the United States District Court for the Middle District of Florida, Tampa Division.

(2) STATEMENT OF FACTS:

Plaintiff's decedent, a longshoreman, was killed on December 31, 1964, when a hatch beam on the vessel PALMETTO STATE became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him almost instantly.

Suit was filed in the Circuit Court of Hillsborough County, Florida, by Petsonella Moragne, individually, and as personal representative of the estate of Edward Moragne, Sr., against the vessel owners, States Marine Lines, Inc., under the Florida Death by Wrongful Act Statute, Florida Statutes, §768.01 et seq. and under the Florida Survival Act, Florida Statutes, §45.11. The defendant, States Marine Lines, Inc., removed the action to the United States District Court in and for the Middle District of Florida, Tampa Division, on the basis of diversity of citizenship. A motion to remand the action to the State Court was subsequently denied.

In her suit, plaintiff alleged in one count a cause of action for unseaworthiness under the Florida Death by Wrongful Act Statute. The District Court, pursuant to mo-

tion by the defendant, dismissed this count on the ground that the Florida Death by Wrongful Act Statute does not give rise to an action for wrongful death caused by unseaworthiness.

Appellant petitioned for leave to appeal this Interlocutory Order of Dismissal. The leave to appeal was granted pursuant to 28 U.S.C. 1292, by Order of this Court, Misc. No. 577, filed October 28, 1966.

The appellees herein filed a Suggestion For Certification Of Controlling Question Of State Law To The Supreme Court. This Suggestion was granted by Order of this Court dated July 8, 1967. The controlling question of Florida law certified hereby has been fully briefed by the parties in briefs styled in this Court which briefs accompany this Certificate. The parties are agreed that these briefs may be presented for consideration by the Supreme Court of Florida as if filed in that Court initially. The parties are agreed that no further briefs need be filed in the Supreme Court of Florida except as that Court may order, and excepting a reply brief which may be filed by the appellant if it so desires.

In substance, the appellant contends on this appeal that the Florida Death by Wrongful Act Statute incorporated the maritime doctrine of unseaworthiness and permits an action under such doctrine. Illustrative authorities relied upon by appellant are:

1. *M. V. Tungus* v. *Skovgaard*, 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, 1959 A.M.C. 813 (1959).

2. *Curry* v. *Fred Olsen Lines*, 367 F. 2d 921 (9th Cir. 1966).

3. *Grigsby* v. *Coastal Marine Lines*, 235 F. Supp. 97 (WD La. 1964).

4. *Byrd* v. *Napoleon Avenue Ferry*, D.C. 125 F. Supp. 573.

5. *Maryland ex rel Smith* v. *A/S Nabella*, 176 F. Supp. 668 (DC Md. 1959).

6. *Maryland ex rel Gladden* v. *Weyerhauser S.S. Co.*, 176 F. Supp. 664 (DC Md. 1959).

7. *Metzger* v. *S.S. Kirsten Torm*, 245 F. Supp. 227 (DC Md. 1956).

8. *United New York & New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959).

9. *Petition of Mariana Mercante Nicaraguense, S.D.*, 248 F. Supp. 15 (SD NY 1965).

10. *Cunningham* v. *Rederiet Vindeggen, A/S*, 333 F. 2d 308 (2d Cir. 1964).

11. *Clark* v. *Iceland S.S. Co.*, 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958).

12. *Olsen* v. *New York Central Railroad Co.*, 341 F. 2d 233 (2d Cir. 1965).

13. *Hess* v. *United States*, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960).

14. *Compania Transatlantica Espanola, S.A.* v. *Melendez Torres*, 358 F. 2d 209, (1st Cir. 1966).

15. *Anthony, Adm.* v. *International Paper Co.*, 289 F.2d 574 (4th Cir. 1961).

16. *Holley* v. *The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959).

17. *Union Carbide Corp.* v. *Goett*, 278 F. 2d 319 (4th Cir. 1960), cert. den. 364 U.S. 824, 81 S. Ct. 64, 5 L. Ed. 2d 55.

18. *Chermesino* v. *Vessel Judith Lee Rose*, 211 F. Supp. 36 (DC Mass. 1962), affm'd. 317 F.2d 927, (1st Cir. 1963), cert. den. 375 U.S. 931, 84 S. Ct. 33, 11 L. Ed. 2d 264.

The appellees contend that the Florida Death by Wrongful Act Statute is based upon concept of fault, creates a new cause of action and does not preserve the rights of the decedent. Illustrative authorities relied upon by appellees are:

1. *Emerson* v. *Holloway Concrete Products Co.*, 282 F.2d 271 (C.A. 5, 1960), cert. den., 364 U.S. 941, 81 S. Ct. 459 (1961).

2. *Florida East Coast Ry. Co.* v. *McRoberts*, 149 So. 631 (Fla. 1933).

3. *Graham* v. *A. Lusi, Ltd.*, 206 F.2d 223 (C.A. 5, 1953).

4. *Gregory* v. *Paducah Midstream Service*, 401 S.W.2d 40, 1966 A.M.C. 2008 (Ky. App. 1966).

5. *Lee* v. *Pure Oil Co.*, 218 F.2d 711 (C.A. 6, 1955).

6. *Niepert* v. *Cleveland Electric Illuminating Co.*, 241 F.2d 916 (C.A. 6, 1957), cert. den., 354 U.S. 909, 77 S. Ct. 1295 (1957).

7. *Parker* v. *City of Jacksonville*, 82 So.2d 131 (Fla. 1955).

8. *Shiver* v. *Sessions*, 80 So.2d 905 (Fla. 1955).

(3) STIPULATED QUESTION OF LAW TO BE ANSWERED:

Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?

The entire record in this case, together with copies of the briefs of the parties in this Court are transmitted herewith.

s/ John R. Brown
UNITED STATES CIRCUIT JUDGE
Presiding

(Filed: May 29, 1968)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1968

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,	**	
Appellants,	**	CASE NO. 36,601
vs.	**	
STATE MARINE LINES, INC., et al.,	**	
Appellees.	**	

Opinion filed May 29, 1968

Certified Question from the United States Court of Appeals for the Fifth Circuit

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, for Appellants

John W. Boult, Dewey R. Villareal, Jr. and Fowler, White, Collins, Gillen, Humkey & Trenam for State Marine Lines, Inc.; David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly for Gulf Florida Terminal Company, Appellees

ROBERTS, J.

This cause is before the court for determination of a question of law certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to §25.031, Fla. Stat., and Rule 4.61, Florida Appellate Rules, 31 F.S.A. Moragne v. State Marine Lines, Inc., et al., opinion and certificate filed August 11, 1967. The question certified reads as follows:—

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

Plaintiff-appellant's decedent was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida. While performing his regular duties as an employee of this company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Suit was filed by his widow, individually, under the Florida Wrongful Death Act, §768.01, Fla. Stat., and as personal representative of her deceased husband's estate, under the Florida Survival Statute, §45.11, Fla. Stat., against the defendant-appellee State Marine Lines, Inc., owner of the vessel S. S. Palmetto State, seeking the damages recoverable under these statutes by those entitled thereto. Originally filed in the appropriate state court, the cause was on motion of the defendant removed to the federal court on diversity-of-citizenship grounds.

The plaintiff's complaint was framed in two aspects: one based on the alleged negligence of the defendant-ship-

owner in failing to keep and maintain the vessel, its equipment and appurtenances, in a safe, sound and proper condition; and another based on the maritime concept of "unseaworthiness." The trial judge dismissed the unseaworthiness count as to the cause of action brought by the plaintiff, individually, under the Florida Wrongful Death Act for the reason that such a cause of action was not within the contemplation of the Wrongful Death Act. Leave to appeal this interlocutory order was granted by the Circuit Court of Appeals, and the question of law above was thereafter certified to this court for decision.

As we understand it, "unseaworthiness" as a basis for liability under maritime law has to do with the absolute nondelegable duty of a shipowner to provide members of the vessel's crew, including longshoremen when engaged in loading, unloading, or stowing the cargo, with a vessel "sufficient in all respects for the trade in which it is employed," Lowe v. Vessel Madrid, D. C. Fla. 1962, 210 Supp. 826, and to prevent their injury by any part of the vessel or equipment used in the ordinary course of their employment. Clark v. Symonette Shipyard Ltd., 330 F. 2d 554 (C.A. Fla. 1964). It contemplates "liability without fault", Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. ed. 561 (1944), and has been said to be "a duty likened to implied contractual warranty." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. ed. 1099.

It is conceded that, had he lived, the plaintiff's decedent could have filed against the defendant-shipowner, in Admiralty, on a cause of action based on unseaworthiness. But this cause of action died with his death under maritime law. Neither the maritime law nor the common law recognized a cause of action for wrongful death. By statute, Congress has provided a remedy for wrongful death on the high seas (the Death on the High Seas Act, enacted in 1920,

46 U.S.C. Sec. 761), and for the death of a seaman (the Jones Act, 46 U.S.C. Sec. 688). But the death of the plaintiff, a non-seaman within the territorial waters of the State of Florida, is not covered by either of these federal statutes. (We note, parenthetically, that even under the Jones Act the plaintiff could not have recovered for the wrongful death of her husband under her cause of action based on unseaworthiness. See Gillespie, Admx. v. United States Steel Corp. 379 U.S. 148, 13 L.Ed. 2d 199 (1964), re-affirming Lindgren v. U. S., 281 U.S. 38, 74 L. ed. 686, decided in 1930.)

It appears that the plaintiff, as the widow of the decedent, is entitled to the benefits prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S. C.A., Chapter 18, for the death of her husband; however, any additional remedy to that provided by the federal compensation act must be found, if at all, under the Florida Wrongful Death Act, §768.01, Fla. Stat.

This Act, §768.01, provides as follows:

> "(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of

her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

Since its enactment in 1833, this Act has been treated as restricted in its application to deaths resulting from tortious acts for which the actor would have been liable to the deceased under traditional common-law concepts. See Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955), and Shearn v. Orlando Funeral Home, 88 So. 2d 591 (Fla. 1956).

It is equally well settled that the Florida Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory beneficiaries a totally new right of action for the wrongful death, on different principles. See Florida East Coast Railway Co. v. McRoberts, 149 So. 631 (Fla. 1933); Shiver v. Sessions, supra, 80 So. 2d 905; Parker v. City of Jacksonville, 82 So. 2d 131 (Fla. 1955). In the Florida East Coast Railway case the plaintiff sought to recover in a wrongful death action the punitive damages which the decedent, had he lived, could have claimed. In holding that they could not be recovered, this court said:—

"The common-law right to recover punitive dam-

> ages having accrued as an incident to the right of the injured party to recover from the tortious injury inflicted in this case, the death of such injured party caused both the right of action and the incidents to it to die at the same time."

It was also pointed out that the language of our Wrongful Death Act, requiring the jury to give such damages "as the party or parties entitled to sue may have sustained by reason of the death of the party killed", clearly implied that punitive damages were to be excluded from consideration in a wrongful death action.

Further illustrating the distinction between the two rights of action — that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act — it was held in each of the other two cases cited above that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So. 2d 905; Parker v. City of Jacksonville, supra, 82 So. 2d 131.

Because of its obligation, in enforcing a state-created right, to "take the right subject to the limitations which have been made a part of its existence . . .", The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.ed. 358 (1886), the Fifth Circuit Court of Appeals held in two cases in accordance with the decisions of this court, supra, that an action for wrongful death based on unseaworthiness was not within the contemplation of the Florida Wrongful Death Act. See Graham v. A. Luci, Ltd., 206 F. 2d 223, (C.A. 5, 1953), and Emerson v. Holloway Concrete Products, 282 F. 2d 271 (C.A. 5, 1960).

On the appeal in the instant case, and here, the appellant contends that amendments to the Florida Wrongful Death

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Act made in 1915 and in 1953 have changed its complexion: that, while originally creating and authorizing death actions only when based on a tort against the plaintiff's decedent, the Act has now been broadened to include causes of action arising *ex contractu* as well as *ex delicto*. The appellate court was urged to recede from its decisions in the Graham and Emerson cases, and this court is urged to reject those decisions and align itself with the "great weight of authority" in other jurisdictions and hold that a death action based on unseaworthiness is created by the Florida Wrongful Death Act.

The courts of other jurisdictions, in the decisions here relied on by appellant, appear to us to have made an entirely different interpretation of their wrongful death acts from that made by this court. For example, in Holley v. The Manfred Stansfield, 269 F. 2d 317 (C.A. 4th 1959), it was held that the Virginia statute was intended "to preserve rights which the decedent would have had if his injuries had not proved fatal." This interpretation is in direct conflict with the statement of this court concerning the Florida Act in Florida East Coast Railway Co. v. McRoberts, supra, 149 So. 631, that the provisions of the Act

> ". . . do not purport to transfer to the statutory representatives . . . the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives . . . a totally new right of action for the wrongful death, and that on different principles."

Likewise, in Vassallo v. Nederl-Amerik etc., 344 S.W.2d 421 (Tex. App. 1961), in rejecting the construction of the Texas Wrongful Death Act made by the Fifth Circuit Court of Appeals in Tuelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (C.A. Tex. 1926), as to the applicability in a death action of the comparative negligence rule authorized in

Admiralty, it was said that under the Texas Wrongful Death Act

> ". . . the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased longshoreman have the same substantive rights to recover as the deceased would have had had his injury been less than death. It follows that this contributory negligence must be considered only in mitigation of damages."

This interpretation is contrary to the decisions of this court quoted above; since, as noted, in the Shiver and Parker cases, supra, 80 So.2d 905 and 82 So.2d 131, the defense asserted by the defendant in each of those cases would have been a bar to a suit by the decedent to recover for *his* injuries, but was disallowed in the suit filed by the statutory beneficiaries to recover for *their* injuries; and in the Florida East Coast Railway case, supra, 149 So. 631, it was held that a substantive right of recovery which the decedent would have had (to recover punitive damages) was extinguished with his death along with his right of action, and that, having once died, the express terms of the Act — requiring the jury to award such damages as the *statutory beneficiaries* may have sustained by reason of the death of their decedent — "affirmatively negatives the idea that punitive damages are to be considered as an incident to the damages allowed for the new statutory cause of action." 149 So. at p.636. And it would seem to be just as inconsistent with the express terms of the Act to allow the damages by the *statutory beneficiaries* by reason of the death of their decedent to be "mitigated" — that is, reduced — in such proportion as the negligence of their decedent contributed to *his* injuries and damage, as it would have been to award punitive damages to the statutory beneficiaries because of the injuries sustained by their decedent.

Yet this would be the result of the holding here contended for by appellant, since the maritime concept of "unseaworthiness" not only holds the ship-owner *liable without fault* but also allows the seaman or longshoreman to recover even though he is at fault — the so-called comparative negligence rule of the maritime law. As noted above, such a result would appear to be "affirmatively negatived" by our Wrongful Death Act, as in the Florida East Coast Railway case, supra, 149 So. at page 636.

We are not, therefore, persuaded by the decisions cited by the appellant, since they appear to be bottomed on statutes entirely different — or, at least, interpreted differently — from the Florida Wrongful Death Act. On the other hand, the appellee calls our attention to decisions based on death statutes interpreted as creating "a new right of action" and holding that the substantive law of the state, rather than concepts peculiar to maritime law such as "unseaworthiness" and the comparative negligence rule, was applicable in a wrongful death action. See Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955); Curtis v. Garcia y Cia, 241 F.2d 30 (C.A. 3, 1957); and Niepert v. Cleveland Electric Illuminating Co., 241 F.2d 916, (C.A. 6, 1957), cert. den. 354 U.S. 909, 77 S.Ct. 1295 (1957). These decisions are in accord with the interpretation of the Florida Wrongful Death Act made by this court in the decisions cited above, and many others.

Nor are we persuaded that the 1915 and 1953 amendments to the Florida Wrongful Death Act had the effect of *creating* a right of action for death caused by unseaworthiness, as contended by the appellant.

The 1915 amendatory Act, Ch. 6913, Laws of Florida, Acts of 1915, was entitled "AN ACT to amend Sec. 3145, General Statutes of the State of Florida, [Sec. 768.01(1), Fla. Stat.] relating to claims for death caused *by negligence*." (Emphasis added.) It added to the statute the clauses ap-

pearing in parentheses in the Act, Sec. 768.01(1), quoted above. The parentheses were a part of the Act, as amended. The purpose of the Legislature in parenthesizing these additions to the Act is not apparent; perhaps, it was simply to make clear that the Act contemplated a cause of action for death even though predicated on circumstances giving rise to a tort cognizable in Admiralty as well as under the substantive law of this state. In any event, we cannot assume that the Legislature intended, in 1915, to extend the Wrongful Death Act to include a right of action based on a concept purely maritime in character, unknown to the common law and the substantive law of this state, contrary to the decisions of this court interpreting the Act, and not within the intendment of the Act, as expressed in the title of the amendatory Act, as one creating a cause of action "for death caused *by negligence.*" If this had been intended, it would have been a simple matter to add appropriate words at the end of the list of derelictions recited in the Act, and to so indicate in the title of the amendatory Act. It did not do so, and still has not done so, unless that result was achieved by the 1953 amendment to the Act, as here contended by the appellant.

The 1953 amendment, Ch. 28280, Laws of Florida, Acts of 1953, added Subsection (2) of the Act, to provide that

> "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

It was adopted subsequent to the decision of this court in Whitley v. Webb City, Inc., 55 So.2d 730 (Fla. 1951), presumably to encompass a death action based on a cause of action for breach of implied warranty without fault recognized by this court in a limited area. See Sencer v. Carl's Market, Inc., 45 So.2d 671 (Fla. 1950); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and cases cited therein. The appellant makes the ingenious argument that

a cause of action for "unseaworthiness" is a specie of "liability without fault", in the nature of an "implied contractual warranty", and, as such, is within the contemplation of the 1953 amendment, supra.

We think no useful purpose would be served in entering into a discussion of the "strict liability" theory under which this court has in a few situations — mostly involving foodstuffs — held a manufacturer or retailer to be strictly liable for injuries resulting from use of a product without regard to established common-law principles relating to implied warranty. It suffices to say that the maritime concept of "unseaworthiness" is completely foreign to the "implied warranty" concept of strict liability with which the Legislature was obviously concerned in enacting the 1953 amendment. Moreover, to hold that "unseaworthiness" is contemplated by the Act, as amended in 1953, we would have to assume that the Legislature intended to grant to one small segment of our population (the surviving dependents of a deceased longshoreman or seaman killed in the course of his employment) the special privileges which the maritime law would have accorded, not to *them*, but to their *decedent*, and to deny an equal advantage to others similarly situated in all respects except as to the occupation of their decedent. In the absence of a clear legislative mandate, we cannot infer such a discriminatory intention on the part of the Legislature, even if it be assumed, arguendo, that such an intention could be validly accomplished. Cf. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co. of Southeast Georgia, 175 So.2d 39 (Fla. 1965).

Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this court in the Whitley case, supra, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature), yet more than fifteen years have elapsed since the

Fifth Circuit Court of Appeals held the Graham case, supra, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of "unseaworthiness," and it has been more than eight years since this holding was reaffirmed in the Emerson case, supra, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.

In all of these circumstances, it is our opinion that to hold that "unseaworthiness" is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.

The decision of a Florida District Court of Appeal in Weed v. Bilbrey, 201 So.2d 771, referred to by appellant, has been noted; however, this decision is pending before this court on direct-conflict certiorari and is not, therefore, either final, authoritative or decisive of the certified question.

For the reasons stated, the answer to the question certified must be in the negative.

CALDWELL, C. J. and THOMAS, J., concur
WHITE, Circuit Judge (Retired), concurs with Opinion
ERVIN, J., dissents with Opinion

WHITE, JOS. S., Circuit Judge, (Retired), concurring:

Liability for "unseaworthiness" as applied by the Federal Courts seems even broader than liability for breach of implied warranty. While the duty arising in case of unseaworthiness has been compared, by way of illustration, with the duty created by implied warranty, yet the Supreme Court of the United States, at the same time, has said: "It (liability for unseaworthiness) is essentially a species of liability without fault, analogous to other well known instances in our laws. Deriving from and shaped to meet the hazards which

performing the service imposes, the liability *is neither limited by conceptions of negligence nor contractual in character.*" See Seas Shipping Co. v. Sieracki, supra. (Emphasis added)

This concept takes the case beyond the purview of Florida's Wrongful Death Statute.

Hence, I concur in the opinion prepared by Mr. Justice Roberts.

ERVIN, J., dissenting:

I am unable to agree with the foregoing opinion insofar as it holds that Florida's Death by Wrongful Act statute (Section 768.01, F.S.) does not incorporate the general maritime law concept of "unseaworthiness" of a vessel.

I agree with the reasoning supplied by Judge Brown in his able dissent in Emerson v. Holloway Concrete Products Company (5thCir.1960), 282 F.2d 271, 285, to the effect that the specific reference to admiralty proceedings contained in the Florida statute reflects a commanding purpose to "extend to survivors whatever benefit the substantive maritime law would have afforded for maritime injuries."

Prior to 1953, I acknowledge that some doubt could have been raised in opposition to the view that Florida statute incorporated substantive maritime concepts; or at least some speculation could have been proffered as to the extent of any such incorporation. Thus, before 1953 the enumeration of the terms "wrongful act," "negligence," "carelessness," or "default" may have provided some support for the proposition that the statute only extended to embrace liability concepts sounding in the characteristics suggested by those specific terms; that is, liability predicated on duties responsive to the fault or negligence culpability of the defendant. Accordingly, until 1953 it might have been argued with some force

that the purposeful scope of the statute necessarily excluded the maritime doctrine of "unseaworthiness" and other principles which predicate liability on implied warranty theory or which are founded on expanding concepts of "strict liability." It is obvious, however, that whatever motion may have existed prior to 1953 concerning the limited nature of substantive concepts of liability under the statute [see Whitley v. Webb City, Inc. (Fla. 1951), 55 So.2d 730] such was clearly expunged by the amendment (Ch. 28,280) in 1953 by the Florida Legislature which provided for actions thereunder ex contractu or ex delicto. Under the amendatory clarification as to the intended scope of substantive liability embraced by the statute, this Court has incurred little difficulty in predicating wrongful death recovery on the theory of "implied warranty." See Green v. American Tobacco Co. (Fla. 1963), 154 So.2d 169. In light of these developments, it can no longer be logically asserted that our Wrongful Death Statute is strictly a "Lord Campbell's Act," and thereby exclusive of those substantive liability concepts foreign to the common law at the time of its enactment.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, seaworthiness was said to be a "duty likened to implied contractual warranty." In Strike v. Netherlands Ministry of Traffic, 185 F.2d 555 (2dCir.1950), cert. den. 341 U.S. 904 (1950), it was defined as "a relationship giving rise to an implied warranty as between the owner and seaman." Viewed, therefore, in accordance with the crystallized scope of our statute pertaining to the substantive law on which recovery thereunder may be achieved, I am convinced that the statute contemplates the incorporation of the maritime concept of seaworthiness. See Weed v. Bilbrey (Fla.App.1967), 201 So.2d 771, holding that the statute embraces the maritime doctrine of comparative negligence. By holding otherwise, I feel the majority has unduly restricted the intent embraced by the 1953 amendment to the statute

and has placed in doubt, if not departed from, the existing law relating to recovery for death predicated on implied warranties of fitness and suitability or other strict liability concepts. See Toombs v. Ft. Pierce Gas Co. (Fla.1968), 208 So.2d 615, for example of the expanding development of nonmaritime liability concepts as potential grounds for predicating wrongful death benefits.

(Title omitted in printing)

(Filed: June 10, 1968)

PETITION FOR REHEARING

Appellant respectfully petitions the Supreme Court of Florida to grant a rehearing and to reconsider its opinion entered and filed in this cause for the reason that the Court majority overlooked or failed to consider the following:

1. The three decisions cited by the Court's majority as authority for the majority holding, i. e., *Lee v. Pure Oil Co.*, 218 F. 2d 711 (CA 6, 1955-Tenn. Statute); *Curtis v. Garcia y Cia*, 241 F. 2d 30 (CA 3, 1957-Pa. Statute); and *Niepert v. Cleveland Electric Illuminating Co.*, 241 F. 2d 916 (CA 6, 1957-Ohio Statute) were all decided before the decision of the Supreme Court in *The M/V Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3E. ed. 2d 524 (1959) and every decision since The Tungus by the courts of a maritime state has been in accord with the decision in *The Tungus v. Skovgaard*, supra, and directly contrary to the holding of the majority in this case.

2. The holdings of the courts of every maritime state which has decided the question is in conflict with the majority decision of this Court, including Massachusetts, New York, New Jersey, Maryland, Virginia, South Carolina, Louisiana, Texas, California and Oregon. This decision of the Florida Supreme Court will make Florida the only major maritime

state denying to the dependents of dead longshoremen the benefits of the admiralty substantive law. (see enumeration of cases p. 14-18 of Appellant's original brief)

3. The Court majority, in holding strictly to common law principles, apparently overlooked the fact that the Florida Death by Wrongful Act statute is itself an abrogation of the common law, the 1953 amendment is an extension of the abrogation of the common law and that the statute is remedial in nature and, therefore, entitled to a liberal construction. *U. S. Fidelity & Guaranty Company v. Reed Construction Co.*, 149 So. 2d 578.

4. The holding of the majority cannot possibly be squared with the decision of this Court in *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963). See also *Green v. American Tobacco Co.*, 391 F. 2d 97 (CA 5, 1968).

5. The Court overlooked the fact that just as strict liability has developed in consumer warranty cases because of the dangerous nature of the products handled, so the doctrine of strict liability has developed in warranty of seaworthiness cases because of the extremely dangerous nature of the work of seamen and longshoremen. This Court has traditionally recognized the need for liberal construction of the law where dangerous instrumentalities or products were concerned, i. e., automobiles, moving cranes, drugs, food stuffs, etc. The Court majority's apparent hostility to the doctrine of unseaworthiness runs diametrically opposite to the traditionally humane attitude of the Florida Supreme Court in like cases.

6. The majority of the Court overlooked the fact that the United States Supreme Court in *The Tungus v. Skovgaard*, supra, while unanimously concurring in the result in that case, divided 5 to 4 on the question as to whether the states should apply state law or state legal interpretation in cases affecting maritime rights. A four member minority of the Supreme Court, (Chief Justice Warren and Justices Brennan, Black and Douglas) felt, in the interest of uniformity, that where it

was once determined that a state wrongful death act furnished a remedy to the dependents of a longshoreman killed in the course of his employment, the admiralty substantive law should be uniformly applied so as to avoid the development of a situation where the dependents of longshoremen in some states were covered by the law and in other states not. A bare majority of five in the Supreme Court (Justices Frankfurter*, Clark*, Harlan, Whittaker* and Stewart) felt that the matter of such interpretation should be left to the states. The decision in this case lends emphasis to the fears expressed by the minority in *The Tungus v. Skovgaard*, supra. (*no longer on the court)

7. While it is true that this Court has many times said that the Florida Act creates a new right or a new and distinct cause for action, this Court has never until now in any case shut out from the benefits of the statute a class of persons who would have benefited through the decedent had he lived. The holding in this case is in no way similar or required by this Court's holdings in *Florida East Coast Railway Co. v. McRoberts*, 149 So. 631 (Fla. 1933); Shiver v. Sessions, 80 S. 2d 905 (Fla. 1955); and *Parker v. City of Jacksonville*, 82 S. 2d 131 (Fla. 1955).

8. The decision of the majority places Florida in direct conflict with the law in every other maritime state in the United States and deprives the dependents of longshoremen of an important right to which they would be entitled if they resided in any other maritime state in the United States. The decision turns Florida backward instead of forward in the area of maritime law. Such a decision can hardly contribute to the growth and progress of this state in a field of growing importance, i. e., maritime trade and commerce.

For the foregoing reasons, Appellant respectfully urges this Court to reconsider its opinion and decision entered and filed on May 29, 1968.

(Signature and certificate of service omitted in printing)

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1968
WEDNESDAY, JULY 3, A.D. 1968

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Appellants

—vs

STATE MARINE LINES, INC., ET AL.,

Appellees

CASE NO. 36,601

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
Clerk Supreme Court

By ALLEN O'NEILL WILKINS
Chief Deputy Clerk

(I HAVE TODAY MAILED TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OPINION OF MAY 29, 1968 IN THE ABOVE CAUSE)

(Title omitted in printing)

(Filed: Aug. 6, 1968)

MOTION FOR ORDER OF REVERSAL NOTWITHSTANDING THE OPINION OF THE FLORIDA SUPREME COURT

The Appellant respectfully requests an Order of Reversal, notwithstanding the opinion of the Florida Supreme Court in this cause and as grounds therefore would show:

1) The Florida Supreme Court's decision on the question certified by this Court is the first time since *Tungus v. Skovgaard*, 358 U. S. 588, 79 S. Ct. 503, 3 L. ed 2d 524, 1959 A.M.C. 813 (1959), that a State Court has interpreted its Wrongful Death Statute to preclude the remedy sought here.

2) To apply Florida State Law will destroy the uniformity of Maritime Law established since the *Tungus* case.

3) The cause of action the Appellant seeks to assert here is grounded on a Federal cause of action which requires uniformity in its application. To apply Florida State Law will destroy the uniformity so necessary to the judicial administration of Federal Maritime Law.

(Signature and certificate of service omitted in printing)

(Title, topical index, and index of citations omitted in printing)

(Filed: Nov. 1, 1968)

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR ORDER OF REVERSAL NOTWITHSTANDING THE OPINION OF THE FLORIDA SUPREME COURT

STATEMENT OF THE CASE

The history and statement of the case are found in Appellant's original brief.

The Court granted Appellant leave to file this Supplemental Brief in open court during the argument upon Appellant's Motion for Judgment of Reversal Notwithstanding the Opinion of the Florida Supreme Court held in New Orleans on October 28, 1968.

CONSTITUTIONAL PROBLEM

The position taken by the Supreme Court of Florida, in its opinion in answer to the question certified by this Court (i. e., that the Florida common law, rather than substantive admiralty law, applies to cases involving the wrongful death of maritime workers killed on navigable waters within the territorial limits of the State of Florida) contravenes and violates Article 3, Section 2, of the Constitution of the United States.

In *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. ed 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of State workmen's compensation statutes to injuries and death occurring on navigable waters within the territorial limits of the States and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such

law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states — not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

> 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted * * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed.

654). (P. 160-161)

* * *

> Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166)

The decision in *Knickerbocker Ice Co. v. Stewart*, supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. ed 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart*, supra, the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court, following *Knickerbocker Ice Co. v. Stewart*, supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. ed 646.

In *Red Cross Line v. Atlantic Fruit Company*, (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. ed 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, from the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

> "The 'right of a common law remedy,' so saved to suitors, does not, as has beeen held in cases

which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124)

* * *

This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124)

The Appellant contends that the State of Florida may provide a remedy for wrongful death occurring on navigable waters of the State provided such remedy is in addition to remedies provided under admiralty law and not in conflict therewith. *The Roanoke*, 189 U.S. 185, 23 S. Ct. 491, 47 L. ed 770; *Gillespie v. U. S. Steel Corp.*, (1964) 379 U.S. 148, 85 S. Ct. 308, 13 L. ed 2d 199.

The Appellant vigorously contends, however, that the State of Florida may not apply state or common law in determining the rights, obligations or liabilities of the parties in a case involving such a maritime death. Clearly, the duty to furnish a seaworthy ship exists whether or not a person is injured or death results from the violation of that duty. The duty is maritime in nature and does not fail to exist simply because a death occurs, granted that there may not be a remedy or a right to obtain damages for the breach of duty,

absent an appropriate State statute. In no event, however, can the Florida courts or legislature constitutionally extend the Florida common law to cover such maritime torts where the common law conflicts with admiralty law.

If the Florida Supreme Court or the Florida Legislature can constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law.

Appellant contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determine the rights, obligations and liabilities of the parties in a case involving a maritime death, except to the extent that it provides a remedy in addition to other remedies provided by admiralty law for the enforcement of duties founded in admiralty law.

In this case, the Florida Supreme Court has extinguished the doctrine of unseaworthiness on Florida waters in death cases. In *Bilbrey v. Weed*, So. 2d recently decided, that Court, following its opinion in this case, has substituted the absolute bar of contributory negligence for the admiralty principle of comparative negligence.

If Florida can do what is claimed here, is there anything to prohibit the legislature from passing nautical rules of the road, collision rules or other substantive principles which conflict with the traditional and ancient substantive law of admiralty, restricted, of course, to death cases, simply on the principle that where Florida furnishes the remedy it may also provide the substantive law?

PRESENT STATUS OF TUNGUS

Appellant also wishes to again call the Court's attention to the questionable present status of the rule announced in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524. In *Tungus*, Chief Justice Warren and

Justices Black, Douglas and Brennan, felt that admiralty law must be applied uniformly and the State wrongful death statutes must be restricted to furnishing a remedy for wrongful death. That the States had no right to furnish the substantive law to go with the remedy, in conflict with admiralty law.

In *Goett v. Union Carbide Corporation*, (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L. ed. 2d 341, and *Hess v. United States*, (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. ed. 2d 305, Justice Whitaker explained his position in *The Tungus* and in doing so apparently receded from the position of the majority therein:

> "I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as remedially supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.
>
> The Court's opinion says that The Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, 'decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' I do not understand the Tungus case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.
> * * *

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a new cause of action for death, it seems rather clear that the West Virginia Wrongful Death statute, like most others, creates a cause of action only in the sense of providing a remedy for death resulting from an act made wrongful by other laws — whether common, statutory or maritime laws — which would have redressed the wrong 'if death had not ensued.' W. Va. Code, 1955, §5474(5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which, 'if death had not ensued,' would have redressed it." (p. 345-346)

In *Hess v. U. S.*, supra, Justices Harlan and Frankfurter receded from their position in *The Tungus*, supra:

"The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.'

I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive

provisions is, in any event, not offensive to maritime law." (p. 322-323)

In *Goett v. Union Carbide Corporation*, supra, the Chief Justice and Justices Black, Douglas and Brennan, noted that they joined with Justice Clark in this per curiam opinion solely under compulsion of *The Tungus* and noted their continuing disagreement with the ruling in *Tungus*. In the *Hess* case, the Chief Justice and Justices Black, Douglas and Brennan likewise joined with Justice Stewart in the majority opinion and noted their continuing disagreement with the decision in *Tungus*.

Appellant, therefore, urges that the majority in *Tungus* has been so dissipated in subsequent decisions that it can no longer serve (if, in fact, it ever did) as controlling authority for the proposition that the States have the paramount right to provide substantive law applicable under their respective wrongful death statutes.

CONCLUSION

It is apparent that there is present confusion regarding the meaning and thrust of the Supreme Court's decision in the *M/V Tungus v. Skovgaard*, supra.

It seems clear, however, that the power of the States is constitutionally limited by Article 3, Section 2 of the United States Constitution. The States may:

1. Provide a remedy for the enforcement of admiralty principles where: (a) no such remedy exists in admiralty law, or (b) the State remedy is in addition to and not in conflict with existing admiralty remedies;

2. The States may not provide a remedy in conflict with existing admiralty remedies; and

3. The States may not provide substantive law in the maritime field since only the Congress and the federal courts have jurisdiction to provide such substantive law.

Here, Florida has clearly provided a remedy for wrongful death where none exists in admiralty law. The remedy itself, that is, the right to recover damages for wrongful death on navigable waters, does not conflict with existing admiralty remedies.

Florida has attempted to go further and to substitute Florida substantive law for existing admiralty substantive law, fixing the rights, obligations and liabilities of the parties arising from death occurring on navigable waters.

This, Florida may not constitutionally do.

(Signature and certificate of service omitted in printing)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24198

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., Deceased and PETSONELLA MORAGNE, Individually,

Appellants,

versus

STATES MARINE LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(April 1, 1969)

Before WISDOM, THORNBERRY, and GOLDBERG, Circuit Judges.

PER CURIAM: On August 11, 1967, this Court entered its certificate certifying to the Supreme Court of Florida the following stipulated question:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Supreme Court of Florida in *Moragne v. State Marine Lines*, 1968, ... Fla. ....., 211 So.2d 1961, in answer to the question, stated:

> "For the reasons stated, the answer to the question certified must be in the negative."

No useful purpose will be served by additional review of pertinent authority upon the issue of law presented in this appeal. It is sufficient to say that in *Tungus v. Skovgaard*, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action for unseaworthiness is a question to be decided by the courts of that state.

Since the Florida Supreme Court has determined that the Florida Wrongful Death Statute does not encompass a cause of action for unseaworthiness, the judgment is AFFIRMED.

United States Court of Appeals

For the Fifth Circuit

October Term, 1968

No. 24198

D. C. Docket No. CA 66-258-CIV-T

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., Deceased and PETSONELLA MORAGNE, Individually,

Appellants,

versus

STATES MARINE LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appelles, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1969

Issued as Mandate: APR 23 1969

STIPULATION

Counsel for the respective parties stipulate that the above and foregoing shall constitute the single Appendix in this case.

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Counsel for Respondent,
Gulf Florida Terminal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing single Appendix have been furnished by hand delivery to each of the following: William A. Gillen, Esquire, of Fowler, White, Collins, Gillen, Humkey & Trenam, 220 Madison Avenue, Tampa, Florida, Counsel for the Respondent, States Marine Lines, Inc., and George W. Ericksen, Esquire, of Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, Counsel for the Respondent, Gulf Florida Terminal Company; and three true copies of same have been furnished by air mail to the following: The Honorable Erwin N. Griswold, Solicitor General, U. S. Department of Justice, Constitution Avenue and 10th Street, N. W., Washington, D. C. and the Clerk of the United States Court of Appeals for the Fifth Circuit, by mail this 24th day of December, 1969, in compliance with the Supreme Court Rules.

By.....

Attorney

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

and

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Turner v. Wilson Line of Mass., (1st Cir. 1957) 242 F. 2d 414 15

Union Carbide Corp. v. Goett, (4th Cir. 1960) 278 F. 2d 319, cert. den. 364 U.S. 826, 81 S. Ct. 64, 5 L. Ed. 2d 55 14

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Weed & Bilbrey, (2d Dist. Fla. 1967) 201 So. 2d 771 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO.....

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

and

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A.

OPINIONS BELOW

The petitioner herein, PETSONELLA MORAGNE, seeks a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit in the case of *Moragne v. States Marine Lines, Inc.* (5th Cir. 1969) ..... F. 2d ....., Case No. 24198, which affirmed an Order of the United States District Court for the Middle District of Florida, striking from the plaintiff's complaint a count which alleged a cause of action based on unseaworthiness. The Court of Appeals for the Fifth Circuit adopted an opinion and decision of the Florida Supreme Court answering a certified question submitted to it by the Court of Appeals in *Moragne v. States Marine Lines, Inc.* (Fla. 1968) 211 So. 2d 161. Copies of the opinions of the Court of Appeals for the Fifth Circuit and of the Florida Supreme Court are appended hereto as Appendix "A" and Appendix "B".

B.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered April 1, 1969. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1); 28 U.S.C. § 2101 (c). The petitioner seeks review, by way of certiorari, of the decision and judgment of the United States Court of Appeals for the Fifth Circuit holding that the Florida Wrongful Death Act does not encompass an action for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on navigable waters of the United States within the territorial jurisdiction of Florida. The Court of Appeals' decision is based upon the answer to a certified question given by the Florida Supreme Court. The Court of Appeals adopted Florida law.

The Court of Appeals made it clear in its decision that it felt bound by *Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, and construed the decision in that case to require the Court of Appeals to look to Florida substantive law in reaching its decision.

The petitioner herein contends that the present status of the holding of this Court in *Tungus v. Skovgaard*, supra, is confusing and equivocal. For a prime example of this confusion see *Hornsby v. Fishmeal Co.* (DC WD La. 1968) 285 F. Supp. 990,993. Also see *Igneri v. Cie de Transports Oceanigues* (2d Cir. 1963) 323 F. 2d 257, cert. den. 376 U.S. 949, 84 S. Ct. 965, 11 L. Ed. 2d 969 (1964); *Alcoa Steamship Co. v. Charles Ferran & Co.*, (5th Cir. 1967) 383 F. 2d 46, cert. den. 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968); *Kenney v. Trinidad Corp.*, (5th Cir. 1965) 349 F. 2d 832, cert. den. 382 U.S. 1030, 86 S. Ct. 652, 15 L. Ed. 2d 542 (1966); and *United New York and Sandy Hook Pilots Assn. v. Rodermond Industries, Inc.* (3rd Cir. 1968) 394 F. 2d 65. In *Tungus*, the majority of the Supreme Court originally, in a 5-4 decision, clearly held that the state's substantive law would apply in an action brought under the state's wrongful death act. Since the original opinion in *Tungus v. Skovgaard*, supra, three of the five Justices who constituted the majority of the Supreme Court have either receded from or qualified their reasoning in that case. The Court of Appeals, nevertheless, felt bound by the original opinion.

Since the decision in *Tungus v. Skovgaard*, supra, the overwhelming majority of the courts that have considered the question, i.e. whether a cause of action may be maintained based upon unseaworthiness under the various state statutes, have concluded that such State Wrongful Death Statutes do incorporate a cause of action for unseaworthiness and do incorporate federal admiralty law. Thus, the holding of the Court of Appeals defining the application of substantive law under the

Florida Wrongful Death Act is in conflict with many decisions of other circuit courts construing the death acts of other states.

Additionally, petitioner contends that the construction given to the Florida Wrongful Death Act by the Court of Appeals for the Fifth Circuit and the Florida Supreme Court contravenes Article III, Section 2 of the Constitution of the United States, and contravenes Article VI of the Constitution of the United States.

C.

QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I) Does Article III, Section 2 of the Constitution of the United States require the uniform application of substantive admiralty law to actions for wrongful death brought under State Wrongful Death Acts arising out of maritime torts committed on navigable waters of the United States within the territorial jurisdiction of the states.

II) Does the uniformity of admiralty and maritime law as contemplated by Article III, Section 2 of the Constitution of the United States and federally developed maritime principles, in cases arising out of deaths occurring on navigable waters of the United States, prohibit the application of substantive state common law principles which are in conflict with substantive admiralty law.

III) Does the application of substantive state common law principles, which are in conflict with substantive federal admiralty principles, in determining the rights and liabilities of a longshoreman, killed upon navigable waters of the United States within the territorial jurisdiction of the State of Florida, contravene the provisions of Article VI of the Constitution of the United States.

NOTE: All emphasis Supplied.
R: Record before The Court of Appeals for the Fifth Circuit.

D.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

I) Florida Statutes, 768.01—Right of action for death —(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation *(or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon)*, and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action *(or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her)* and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation *(or the ship, vessel or boat)*, which would have been liable in damages if death had not ensued shall be liable to an action for damages *(or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam)*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto. (Emphasis added.)

II) Constitution of the United States, Article III, Section 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United

States and treaties made, or which shall be made, under their authority . . . to all cases of admiralty and maritime jurisdiction.

III) Constitution of the United States, Article VI:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

E.

STATEMENT OF THE CASE

On December 31, 1964, Edward Moragne, Sr., a longshoreman, in Tampa, Florida, was killed while working on board the PALMETTO STATE, a vessel owned by the respondent States Marine Lines, Inc., when a hatch beam over hatch No. 4 on the vessel became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the No. 4 hold striking the deceased in the head killing him almost instantly.

Subsequently, his widow the petitioner, Petsonella Moragne, for herself and her two minor children, and as personal representative of the Estate of Edward Moragne, Sr., brought an action against the vessel owner, States Marine Lines, Inc., pursuant to the Florida Wrongful Death Act, 768.01 (R 4). The defendant, States Marine Lines, Inc., removed the action to the United States District Court for the Middle District of Florida on the basis of diversity jurisdiction (R 1). A motion to remand the action to the State Court (R 42) was subsequently denied (R 51). Petitioner, in Count II of her complaint (R 8), alleged a cause of action based upon the unseaworthiness of the vessel PALMETTO STATE.

Upon motion of the shipowner, States Marine Lines, Inc., to dismiss Count II of the complaint based upon unseaworthiness (R 38), the District Court dismissed the Count from the complaint but in the court's order (R 52) stated that there was involved "a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate determination of this litigation." (R 54).

Petitioner requested leave of the United States Court of Appeals for the Fifth Circuit to take an interlocutory appeal pursuant to 28 U.S.C. § 1292. Such leave was granted by the Court of Appeals on October 28, 1966 (R 55). The respondent herein then requested the Court of Appeals to certify the question of law involved to the Florida Supreme Court and over petitioner's objection the Court of Appeals did on August 11, 1967, forward its certificate to the Florida Supreme Court (R 84). In the certificate transmitted to the Florida Supreme Court by the Court of Appeals for the Fifth Circuit, the question of law to be answered was stated as follows:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of longshoremen caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Florida Supreme Court, by its decision appended hereto, answered this question in the negative on May 29, 1968. Rehearing was denied by the Florida Supreme Court on July 23, 1968.

Petitioner then filed an extraordinary motion in the United States Court of Appeals for the Fifth Circuit asking the Court of Appeals to hold that the Florida Death by Wrongful Act statute did incorporate an action for unseaworthiness by virtue of federal maritime principles and to hold

that the Florida Supreme Court was correct in deciding that the Florida Death by Wrongful Act statute did provide a remedy for death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida but that the Florida Supreme Court was incorrect in holding that the substantive common law principles of Florida followed such remedy and were paramount and superceded the federal maritime law regarding the substantive rights and liabilities of the parties.

The Court of Appeals for the Fifth Circuit heard oral argument on this extraordinary motion on October 28, 1968 and accepted supplemental briefs addressed to the constitutional issues involved.

On April 1, 1969, the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court striking the unseaworthiness count from plaintiff's complaint and said:

> "No useful purpose will be served by additional review of pertinent authority on the issue of law presented in this appeal. It is sufficient to state that in *Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action of unseaworthiness is a question to be decided by the courts of that state."

While this case was pending before the Court of Appeals, the Florida Supreme Court granted certiorari in the case of *Bilbrey v. Weed*, 215 So. 2d 479, and reversed the decision of the Second District Court of Appeals of Florida, 201 So. 2d 771. In the *Weed* case the Florida Supreme Court held that since the substantive state common law applied to deaths occurring upon navigable waters within the territorial jurisdiction of the State of Florida, the cause of action of the plaintiff Weed was barred by contributory negligence of the decedent

in her action under the Florida Death by Wrongful Act statute and that the admiralty doctrine of comparative negligence did not apply under the Florida Statute.

F.

REASONS FOR ALLOWING WRIT

The decision and judgment of the United States Court of Appeals for the Fifth Circuit contravenes and violates Article III, Section 2 of the Constitution of the United States. It decides an important issue in a manner which in all probability is not in accordance with the law as this Court would now pronounce it. It applies Florida substantive common law tort principles to a case of death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. The petitioner contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determines the rights, obligations and liabilities of the parties in a case involving a maritime death occurring upon navigable waters of the United States except to the extent that it provides a remedy in addition to other remedies provided by admiralty or federal law for the enforcement of duties rooted in admiralty law.

In this case, the Court of Appeals, adopting the decision of the Florida Supreme Court, has extinguished the doctrine of unseaworthiness in cases of death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida.

If the Florida Supreme Court or the Florida Legislature can constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law in contravention of Article VI of the Constitution of the United States.

The Court of Appeals failed to distinguish between the *remedy* for an action based upon wrongful death provided by

the Florida Statute (which does not conflict with existing admiralty remedies) and the *substantive law* applicable to torts occurring upon navigable waters of the United States. Here the Court of Appeals delegated to the Florida Supreme Court the authority to determine by what substantive law principles deaths occurring on navigable waters of the State of Florida would be defined and governed.

In so doing, the Court of Appeals stated that it felt constrained to follow the majority opinion of the Supreme Court in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524.

In *Tungus*, the Chief Justice and Justices Black, Douglas and Brennan felt that admiralty law must be applied uniformly and that the State Wrongful Death Statutes must be restricted to furnishing a remedy for wrongful death; that the states had no right to furnish substantive law conflicting with established admiralty law.

Of the Justices in the majority in *Tungus*, Justice Whittaker apparently receded from the majority opinion in *Tungus* in *Goett v. Union Carbide Corp.* (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L. ed. 2d 341, when he said:

> "The court's opinion says that *The Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, 'decided that it was a question of State law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding in a maritime tort death case the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' *I do not understand the Tungus case to so hold, and if such a*

holding was intended by its author or by any of the Justices who joined it, it does not say so.

* * *

> And when, in a case encompassed by the terms of the State's Wrongful Death Statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which 'if death had not insued' would have redressed it." (emphasis supplied) (pages 345-346).

In *Hess v. U. S.*, (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. ed. 2d 305, Justices Harlan and Frankfurter, who joined in the original majority opinion in *Tungus*, apparently qualified their holding in *Tungus*:

> "The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.' I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive provisions is, in any event, not offensive to maritime law." (p. 322-323).

In both *Goett* and *Hess* the Chief Justice and Justices Black, Douglas and Brennan, joined with the authors of those decisions solely under compulsion of the majority holding in *Tungus* and expressed their continuing disagreement with the ruling in *Tungus*.

In view of the qualifications placed upon the decision in *Tungus* by three of the Justices, constituting the original majority, it is now difficult to tell what *Tungus* actually stands for. Compare *Tungus* with the Court's language in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143, where this court said:

> "His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a State-created remedy for his right, federal maritime law would be controlling. While States may sometimes supplement federal maritime policies, a State may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

The Court of Appeals for the Fifth Circuit, after spending considerable time, hearing oral argument and accepting supplemental briefs, concluded that it was bound by the original majority opinion in *Tungus* to accord to the State of Florida the right to decide what substantive law would apply to actions for death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida.

Since the Court's decision in *Tungus*, the overwhelming majority of the courts which have considered the Wrongful Death Statutes of the various states have concluded that these statutes, dissimilar as they may be, in each instance incorporate admiralty substantive law.

It was only when the Florida Supreme Court handed down its opinion in the instant case that the fears of the Chief Justice and Justices Black, Douglas and Brennan, expressed in *Tungus*, came to fruition.

Since this Court's decision in *Tungus*, the following courts have construed death acts of the various states to incorporate admiralty substantive law:

CALIFORNIA

Curry v. Fred Olsen Lines, 367 F. 2d 921 (9th Cir. 1966) cert. den. 386 U.S. 971, 87 S. Ct. 1165, 18 L. Ed. 2d 131 (1967)

LOUISIANA

Grigsby v. Coastal Marine Lines, 235 F. Supp. 97 (WD La. 1964)

MARYLAND

Maryland ex rel Smith v. A/S Nabella, 176 F. Supp. 668 (DC Md. 1959)

Maryland ex rel Gladden v. Weyerhauser S.S. Co., 176 F. Supp. 664, (DC Md. 1959)

Metzger v. S.S. Kirsten Torm, 245 F. Supp. 227 (DC Md. 1965)

MICHIGAN

Hunter v. Dampsk A/S Flint, (DC ED Mich. 1967) 279 F. Supp. 701

NEW JERSEY

United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S. Ct. 517, 3 L. ed. 2d 541 (1959)

Petition of Marina Mercante Nicaraguense, S.D., 248 F. Supp. 15 (SD NY 1965); 364 F. 2d 118 (1966); cert. den. 385 U.S. 1005, 87 S. Ct. 710, 17 L. Ed. 2d 544; reh. den. 386 U.S. 929, 87 S. Ct. 851, 17 L. Ed. 2d 803 (1967)

NEW YORK

Cunningham v. Rederiet Vindeggen, A/S, 333 F. 2d 308 (2d Cir. 1964)

Clark v. Iceland S.S. Co., 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958)

Olsen v. New York Central Railroad Co., 341 F. 2d 233 (2d Cir. 1965)

OREGON

Hess v. United States, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960)

Tallmon v. Toko Kaium K. K. Kobe, (DC Ore. 1967) 278 F. Supp. 452

PUERTO RICO

Compania Transatlantica Espanola, S.A. v. Melendez Torres, 358 F. 2d 209, (1st Cir. 1966)

SOUTH CAROLINA

Anthony, Adm. v. International Paper Co., 289 F. 2d 574, (4th Cir. 1961)

TEXAS

Vassallo v. Nederl-Amerik Stoomv Maats Holland, 344 S.W. 2d 421, (Tex. 1961)

VIRGINIA

Holley v. The Manfred Stansfield, 269 F. 2d 317 (4th Cir. 1959); cert. den. 361 U.S. 883, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1961)

WEST VIRGINIA

Union Carbide Corp. v. Goett, 278 F. 2d 319 (4th Cir. 1960), cert. den. 364 U.S. 826, 81 S. Ct. 64, 5 Law Ed. 2d 55

It is indicated that Massachusetts would follow the same principle. *O'Leary v. United States Lines*, 215 F. 2d 708 (1st Cir. 1954); cert. den. 348 U.S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955); and *Turner v. Wilson Line of Mass.*, 242 F. 2d 414 (1st Cir. 1957).

The verbatim Statutes are set forth in Appendix "C" attached hereto.

Under the Death on the High Seas Act, 46 U.S.C.A. § 761, the federal courts have held that a right of action for unseaworthiness is incorporated within the terms of that act. *Montgomery v. Goodyear Tire and Rubber Co.*, 241 F. Supp. 447 (DC NY 1964); affmd. 392 F. 2d 777 (2d Cir. 1968); cert. den. 393 U.S. 841, 89 S. Ct. 121, 21 L. Ed. 2d 112 (1968); and *Chermesino v. Vessel Judith Lee Rose*, 211 F. Supp. 36 (DC Mass. 1962), affm'd. 317 F. 2d 927, (1st Cir. 1963), cert. den. 375 U.S. 931, 84 S. Ct. 333, 11 L. Ed. 2d 264 (1963).

Thus, Florida stands alone among the major maritime states in denying to the widow and children of a deceased longshoreman the benefit of the maritime doctrine of unseaworthiness and the benefit of the maritime doctrine of comparative negligence.

Uniformity of maritime law forbids such a result. In *Knickerbocker Ice Company v. Stewart*, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of state workmen's compensation statutes to injuries and death occurring on navigable waters within the territorial limits of the states and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within

the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.

To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states which each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654). (p. 160-161).

Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there

will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166).

The decision in *Knickerbocker Ice Co. v. Stewart,* supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart,* supra, the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court, following *Knickerbocker Ice Co. v. Stewart,* supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646.

In *Red Cross Line v. Atlantic Fruit Company,* (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, from the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

"The 'right of a common law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to re-

dress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124) * * *

This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124).

The instant decision, which is contrary to all recent holdings by other courts, appears to arise over a confusion between remedies and substantive principles.

There is no question that the Florida Wrongful Death Act provides a remedy for wrongful deaths occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. It is also established law that this remedy carries with it all the burdens and limitations placed upon the remedy by the state.

The question is, whether or not the state may provide substantive law which conflicts with federal admiralty law to determine the rights and liabilities of the parties for whom the remedy is provided.

The remedy itself does not conflict with any principles of admiralty law. The Congress has not seen fit to legislate in this field or to provide a remedy for wrongful death within the states' territorial waters.

The substantive law governing torts occurring on navigable waters of the United States, however, is fixed and defined by federal law. Here the Court of Appeals has adopted state law which is in violent and direct conflict with the federal substantive law applicable to maritime torts.

If by legislation or court decision Florida may provide a remedy for disputes arising upon Florida's navigable waters where there is no existing remedy under federal law and then may provide the substantive law to go with the remedy where substantive law conflicts with federal law, then such state law becomes paramount to the federal maritime law and contravenes Article III, Section 2 and Article VI of the Constitution of the United States.

This is a result which the framers of the Constitution could not have intended. Clearly, federal law must remain paramount in the settling of disputes arising on navigable waters of the United States.

If the substantive law promulgated by the various states is applied to maritime disputes and is paramount to federal law, then the power of the United States in the maritime field is substantially damaged and one of the basic purposes of the original union of the states has been effectively demolished.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The Supreme Court should review its reasoning in *Tungus v. Skovgaard, supra,* and recede from the reasoning of the original majority in that case. The decision and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed with instructions to that Court to enter a judgment in accordance with substantive admiralty principles.

Respectfully submitted,

CHARLES JAY HARDEE, JR. of
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101 East Kennedy Boulevard
Tampa, Florida 33602

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were hand delivered to Fowler, White, Collins, Gillen, Humkey & Trenam, 220 Madison Avenue, Tampa, Florida, Attorneys for States Marine Lines, Inc., and Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, attorneys for Gulf Florida Terminal Company, this 28th day of May, 1969, and to the Clerk of the United States Court of Appeals for the Fifth Circuit by mail this 28th day of May, 1969, in compliance with the Supreme Court Rules.

By.....

Charles Jay Hardee, Jr.

APPENDIX

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APPENDIX "A"

(Title Omitted)

Opinion filed April 1, 1969.

Appeal from the United States District Court for the Middle District of Florida.

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, Tampa, for Petitioner-Appellant.

John W. Boult, Dewey R. Villareal, Jr. and Fowler, White, Collins, Gillen, Humkey & Trenam, Tampa, for States Marine Lines, Inc.

David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly, Tampa, for Gulf Florida Terminal Co.

Before WISDOM, THORNBERRY, and GOLDBERG, Circuit Judges.

PER CURIAM: On August 11, 1967, this Court entered its certificate certifying to the Supreme Court of Florida the following stipulated question:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Supreme Court of Florida in *Moragne v. State Marine Lines*, 1968, ... Fla. ....., 211 So.2d 1961, in answer to the question, stated:

> "For the reasons stated, the answer to the question certified must be in the negative."

No useful purpose will be served by additional review of pertinent authority upon the issue of law presented in this

appeal. It is sufficient to say that in *Tungus v. Skovgaard*, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action for unseaworthiness is a question to be decided by the courts of that state.

Since the Florida Supreme Court has determined that the Florida Wrongful Death Statute does not encompass a cause of action for unseaworthiness, the judgment is AFFIRMED.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1969

Issued as Mandate: April 23, 1969.

APPENDIX "B"
(Title Omitted)

Opinion filed May 29, 1968.

Certified Question from the United States Court of Appeals for the Fifth Circuit.

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, for Appellants.

John W. Boult, Dewey R. Villareal, Jr., and Fowler, White, Collins, Gillen, Humkey & Trenam for States Marine Lines, Inc.; David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly, for Gulf Florida Terminal Company, Appellees.

ROBERTS, Justice.

This cause is before the court for determination of a question of law certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to § 25.031, Fla.Stat., F.S.A., and Rule 4.61, Florida Appellate Rules, 32 F.S.A. Moragne v. State Marine Lines, Inc., et al., opinion and certificate filed August 11, 1967. The question certified reads as follows:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

Plaintiff-appellant's decedent was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida. While performing his regular duties as an employee of this company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Suit was filed by his widow, individually, under the Florida Wrongful Death Act, § 768.01, Fla.Stat., F.S.A., and as personal representative of her deceased husband's estate, under the Florida Survival Statute, § 45.11, Fla.Stat., F.S.A., against the defendant-appellee State Marine Lines, Inc., owner of the vessel S. S. Palmetto State, seeking the damages recoverable under these statutes by those entitled thereto. Originally filed in the appropriate state court, the cause was on motion of the defendant removed to the federal court on diversity-of-citizenship grounds.

The plaintiff's complaint was framed in two aspects: one based on the alleged negligence of the defendant-shipowner in failing to keep and maintain the vessel, its equipment and appurtenances, in a safe, sound and proper condition; and another based on the maritime concept of "unseaworthiness." The trial judge dismissed the unseaworthiness count as to the cause of action brought by the plaintiff, individually, under the Florida Wrongful Death Act for the reason that such a cause of action was not within the contemplation of the Wrongful Death Act. Leave to appeal this interlocutory order was granted by the Circuit Court of Appeals, and the question of law quoted above was thereafter certified to this court for decision.

As we understand it, "unseaworthiness" as a basis for liability under maritime law has to do with the absolute nondelegable duty of a shipowner to provide members of the vessel's crew, including longshoremen when engaged in loading, unloading, or stowing the cargo, with a vessel "sufficient in all respects for the trade in which it is employed," Lowe v. Vessel Madrid, D.C.Fla.1962, 210 F.Supp. 826, and to prevent their injury by any part of the vessel or equipment used in the ordinary course of their employment. Clark v. Symonette Shipyards, Ltd., 330 F.2d 554 (C.A.5 1964). It contemplates "liability without fault", Mahnich v. Southern S. S. Co.,

321 U.S. 96, S.Ct. 455, 88 L.Ed. 561 (1944), and has been said to be "a duty likened to implied contractual warranty." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099.

It is conceded that, had he lived, the plaintiff's decedent could have filed suit against the defendant-shipowner, in Admiralty, on a cause of action based on unseaworthiness. But this cause of action died with his death under maritime law. Neither the maritime law nor the common law recognized a cause of action for wrongful death. By statute, Congress has provided a remedy for wrongful death on the high seas (the Death on the High Seas Act, enacted in 1920, 46 U.S.C. Sec. 761); and for the death of a seaman (the Jones Act, 46 U.S.C. Sec. 638). But the death of the plaintiff, a non-seaman within the territorial waters of the State of Florida, is not covered by either of these federal statutes. (We note, parenthetically, that even under the Jones Act the plaintiff could not have recovered for the wrongful death of her husband under her cause of action based on unseaworthiness. See Gillespie, Admx. v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), re-affirming Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686, decided in 1930.)

It appears that the plaintiff, as the widow of the decedent, is entitled to the benefits prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C.A., Chapter 18, for the death of her husband; however, any additional remedy to that provided by the federal compensation act must be found, if at all, under the Florida Wrongful Death Act, § 768.01, Fla.Stat., F.S.A.

This Act, § 768.01, provides as follows:

"(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default

of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

Since its enactment in 1833, this Act has been treated as restricted in its application to deaths resulting from tortious acts for which the actor would have been liable to the deceased under traditional common-law concepts. See Shiver v. Sessions, 80 So.2d 905 (Fla.1955), and Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591 (Fla.1956).

It is ~~equally~~ well settled that the Florida Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory

beneficiaries a totally new right of action for the wrongful death, on different principles. See Florida East Coast Railway Co. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955). In the Florida East Coast Railway case the plaintiff sought to recover in a wrongful death action the punitive damages which the decedent, had he lived, could have claimed. In holding that they could not be recovered, this court said:

> "The common-law right to recover punitive damages having accrued as an incident to the right of the injured party to recover from the tortious injury inflicted in this case, the death of such injured party caused both the right of action and the incidents to it to die at the same time."

It was also pointed out that the language of our Wrongful Death Act, requiring the jury to give such damages "as the party or parties entitled to sue may have sustained by reason of the death of the party killed", clearly implied that punitive damages were to be excluded from consideration in a wrongful death action.

Further illustrating the distinction between the two rights of action—that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act—it was held in each of the other two cases cited above that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, supra, 82 So.2d 131.

Because of its obligation, in enforcing a state-created right, to "take the right subject to the limitations which have been made a part of its existence * * *", The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), the Fifth Cir-

cuit Court of Appeal held in two cases in accordance with the decisions of this court, supra, that an action for wrongful death based on unseaworthiness was not within the contemplation of the Florida Wrongful Death Act. See Graham v. A. Lusi, Ltd., 206 F.2d 223 (C.A.5, 1953), and Emerson v. Holloway Concrete Products Co., 282 F.2d 271 (C.A.5, 1960).

On the appeal in the instant case, and here, the appellant contends that amendments to the Florida Wrongful Death Act made in 1915 and in 1953 have changed its complexion: that, while originally creating and authorizing death actions only when based on a tort against the plantiff's decedent, the Act has now been broadened to include causes of action arising *ex contractu* as well as *ex delicto*. The appellate court was urged to recede from its decisions in the Graham and Emerson cases, and this court is urged to reject those decisions and align itself with the "great weight of authority" in other jurisdictions and hold that a death action based on unseaworthiness is created by he Florida Wrongful Death Act.

The courts of other jurisdictions, in the decisions here relied on by appellant, appear to us to have made an entirely different interpretation of their wrongful death acts from that made by this court. For example, in Holley v. The Manfred Stansfield, 269 F.2d 317 (C.A.4th 1959), it was held that the Virginia statute was intended "to preserve rights which the decedent would have had if his injuries had not proved fatal." This interpretation is in direct conflict with the statement of this court concerning the Florida Act in Florida East Coast Railway Co. v. McRoberts, supra, 149 So. 631, that the provisions of the Act

> "* * * do not purport to transfer to the statutory representatives * * * the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives * * * a totally new right of action for the wrongful death, and that on different principles."

Likewise, in Vassallo v. Nederl-Amerik etc., 162 Tex. 52, 344 S.W.2d 421 (1961), in rejecting the construction of the Texas Wrongful Death Act made by the Fifth Circuit Court of Appeals in Truelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (C.A.5 1926), as to the applicability in a death action of the comparative negligence rule recognized in Admiralty, it was said that under Texas Wrongful Death Act

> "* * * the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased longshoreman have the same substantive rights to recover as the deceased would have had had his injury been less than death. It follows that his contributory negligence must be considered only in mitigation of damages."

This interpretation is contrary to the decisions of this court quoted above; since, as noted, in the Shiver and Parker cases, supra, 80 So.2d 905 and 82 So.2d 131, the defense asserted by the defendant in each of those cases would have been a bar to a suit by the decedent to recover for *his* injuries, but was disallowed in the suit filed by the statutory beneficiaries to recover for *their* injuries; and in the Florida East Coast Railway case, supra, 149 So. 631, it was held that a substantive right of recovery which the decedent would have had (to recover punitive damages) was extinguished with his death along with his right of action, and that, having once died, the express terms of the Act—requiring the jury to award such damages as the *statutory beneficiaries* may have sustained by reason of the death of their decedent—"affirmatively negatives the idea that punitive damages are to be considered as an incident to the damages allowed for the new statutory cause of action." 149 So. at p. 636. And it would seem to be just as inconsistent with the express terms of the Act to allow the damages sustained by the *statutory beneficiaries* by reason of the death of their decedent to be "mitigated"—that is, reduced—

in such proportion as the negligence of their decedent contributed to *his* injuries and damage, as it would have been to award punitive damages to the statutory beneficiaries because of the injuries sustained by their decedent. Yet this would be the result of the holding here contended for by appellant, since the maritime concept of "unseaworthiness" not only holds the ship-owner *liable without fault* but also allows the seaman or longshoreman to recover even though he is at fault—the so-called comparative negligence rule of the maritime law. As noted above, such a result would appear to be "affirmatively negatived" by our Wrongful Death Act, as in the Florida East Coast Railway case, supra, 149 So. at page 636.

We are not, therefore, persuaded by the decisions cited by the appellant, since they appear to be bottomed on statutes entirely different—or, at least, interpreted differently—from the Florida Wrongful Death Act. On the other hand, the appellee calls our attention to decisions based on death statutes interpreted as creating "a new right of action" and holding that the substantive law of the state, rather than concepts peculiar to maritime law such as "unseaworthiness" and the comparative negligence rule, was applicable in a wrongful death action. See Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955); Curtis v. Garcia y Cia, 241 F.2d 30 (C.A. 3, 1957); and Niepert v. Cleveland Electric Illuminating Co., 241 F.2d 916 (C.A. 6, 1957), cert. den. 354 U.S. 909, 77 S.Ct. 1295, 1 L.Ed.2d 1427 (1957). These decisions are in accord with the interpretation of the Florida Wrongful Death Act made by this court in the decisions cited above, and many others.

Nor are we persuaded that the 1915 and 1953 amendments to the Florida Wrongful Death Act had the effect of *creating* a right of action for death caused by unseaworthiness, as contended by the appellant.

The 1915 amendatory Act, Ch. 6913, Laws of Florida, Acts of 1915, was entitled "AN ACT to Amend Section 3145,

General Statutes of the State of Florida, [Sec. 768.01(1), Fla.Stat.] Relating to Claims for Death Caused *by Negligence.*" (Emphasis added.) It added to the statute the clauses appearing in parentheses in the Act, Sec. 768.01(1), quoted above. The parentheses were a part of the Act, as amended. The purpose of the Legislature in parenthesizing these additions to the Act is not apparent; perhaps, it was simply to make clear that the Act contemplated a cause of action for death even though predicated on circumstances giving rise to a tort cognizable in Admiralty as well as under the substantive law of this state. In any event, we cannot assume that the Legislature intended, in 1915, to extend the Wrongful Death Act to include a right of action based on a concept purely maritime in character, unknown to the common law and the substantive law of this state, contrary to the decisions of this court interpreting the Act, and not within the intendment of the Act, as expressed in the title of the amendatory Act, as one creating a cause of action "for death caused by *negligence.*" If this had been intended, it would have been a simple matter to add appropriate words at the end of the list of derelictions recited in the Act, and to so indicate in the title of the amendatory Act. It did not do so, and still has not done so, unless that result was achieved by the 1953 amendment to the Act, as here contended by the appellant.

The 1953 amendment, Ch. 28280, Laws of Florida, Acts of 1953, added Subsection (2) of the Act, to provide that

> "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

It was adopted subsequent to the decision of this court in Whiteley v. Webb's City, Inc., 55 So.2d 730 (Fla.1951), presumably to encompass a death action based on a cause of action for breach of implied warranty without fault recognized by this court in a limited area. See Sencer v. Carl's Market, Inc.,

45 So.2d 671 (Fla. 1950); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla.1965), and cases cited therein. The appellant makes the ingenious argument that a cause of action for "unseaworthiness" is a specie of "liability without fault", in the nature of an "implied contractual warranty", and, as such, is within the contemplation of the 1953 amendment, supra.

We think no useful purpose would be served in entering into a discussion of the "strict liability" theory under which this court has in a few situations—mostly involving foodstuffs—held a manufacturer or retailer to be strictly liable for injuries resulting from use of a product without regard to established common-law principles relating to implied warranty. It suffices to say that the maritime concept of "unseaworthiness" is completely foreign to the "implied warranty" concept of strict liability with which the Legislature was obviously concerned in enacting the 1953 amendment. Moreover, to hold that "unseaworthiness" is contemplated by the Act, as amended in 1953, we would have to assume that the Legislature intended to grant to one small segment of our population (the surviving dependents of a deceased longshoreman or seaman killed in the course of his employment) the special privileges which the maritime law would have accorded, not to *them*, but to their *decedent*, and to deny an equal advantage to others similarly situated in all respects except as to the occupation of their decedent. In the absence of a clear legislative mandate, we cannot infer such a discriminatory intention on the part of the Legislature, even if it be assumed, arguendo, that such an intention could be validly accomplished. Cf. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co. of Southeast Georgia, 175 So.2d 39 (Fla.1965).

Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this court in the Whiteley case, supra, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature),

yet more than fifteen years have elapsed since the Fifth Circuit Court of Appeals held in the Graham case, supra, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of "unseaworthiness," and it has been more than eight years since this holding was re-affirmed in the Emerson case, supra, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.

In all of these circumstances, it is our opinion that to hold that "unseaworthiness" is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.

The decision of a Florida District Court of Appeal in Weed v. Bilbrey, 201 So.2d 771, referred to by appellant, has been noted; however, this decision is pending before this court on direct-conflict certiorari and is not, therefore, either final, authoritative or decisive of the certified question.

For the reasons stated, the answer to the question certified must be in the negative.

CALDWELL, C. J., and THOMAS, J., concur.

WHITE, Circuit Judge (Retired), concurs with Opinion.

ERVIN, J., dissents with Opinion.

WHITE, JOS. S., Circuit Judge (Retired) (concurring).

Liability for "unseaworthiness" as applied by the Federal Courts seems even broader than liability for breach of implied warranty. While the duty arising in case of unseaworthiness has been compared, by way of illustration, with the duty created by implied warranty, yet the Supreme Court of the United States, at the same time, has said: "It (liability for unseaworthiness) is essentially a species of liability without fault, analogous to other well known instances in our law. Deriving from and shaped to meet the hazards which performing the service imposes, the liability *is neither limited by conceptions of negligence nor contractual in character.*" See Seas Shipping Co. v. Sieracki, supra. (Emphasis added.)

This concept takes the case beyond the purview of Florida's Wrongful Death Statute.

Hence, I concur in the opinion prepared by Mr. Justice ROBERTS.

ERVIN, Justice (dissenting).

I am unable to agree with the foregoing opinion insofar as it holds that Florida's Death by Wrongful Act statute (F.S. Section 768.01, F.S.A.) does not incorporate the general maritime law concept of "unseaworthiness" of a vessel.

I agree with the reasoning supplied by Judge Brown in his able dissent in Emerson v. Holloway Concrete Products Company (5th Cir.1960), 282 F.2d 271, 285, to the effect that the specific reference to admiralty proceedings contained in the Florida statute reflects a commanding purpose to "extend to survivors whatever benefit the substantive maritime law would have afforded for maritime injuries."

Prior to 1953, I acknowledge that some doubt could have been raised in opposition to the view that Florida's statute incorporated substantive maritime concepts; or at least some speculation could have been proferred as to the extent of any such incorporation. Thus, before 1953 the enumeration of the terms "wrongful act," "negligence," "carelessness," or "default" may have provided some support for the proposition that the statute only extended to embrace liability concepts sounding in the characteristics suggested by those specific terms; that is, liability predicated on duties responsive to the fault or negligence culpability of the defendant. Accordingly, until 1953 it might have been argued with some force that the purposeful scope of the statute necessarily excluded the maritime doctrine of "unseaworthiness" and other principles which predicate liability on implied warranty theory or which are founded on expanding concepts of "strict liability." It is obvious, however, that whatever notion may have existed prior to 1953 concerning the limited nature of substantive concepts of liability under the statute [see Whiteley v. Webb's City,

Inc. (Fla.1951), 55 So.2d 730] such was clearly expunged by the amendment (Ch. 28280) in 1953 by the Florida Legislature which provided for actions thereunder ex contractu or ex delicto. Under the amendatory clarification as to the intended scope of substantive liability embraced by the statute, this Court has incurred little difficulty in predicating wrongful death recovery on the theory of "implied warranty." See Green v. American Tobacco Co. (Fla.1963), 154 So.2d 169. In light of these developments, it can no longer be logically asserted that our Wrongful Death Statute is strictly a "Lord Campbell's Act," and thereby exclusive of those substantive liability concepts foreign to the common law at the time of its enactment.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, seaworthiness was said to be a "duty likened to implied contractual warranty." In Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), cert. den. 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343 (1950), it was defined as "a relationship giving rise to an implied warranty as between the owner and seaman." Viewed, therefore, in accordance with the crystallized scope of our statute pertaining to the substantive law on which recovery thereunder may be achieved, I am convinced that the statute contemplates the incorporation of the maritime concept of seaworthiness. See Weed v. Bilbrey (Fla.App.1967), 201 So.2d 771, holding that the statute embraces the maritime doctrine of comparative negligence. By holding otherwise, I feel the majority has unduly restricted the intent embraced by the 1953 amendment to the statute and has placed in doubt, if not departed from, the existing law relating to recovery for death predicated on implied warranties of fitness and suitability or other strict liability concepts. See Toombs v. Ft. Pierce Gas Co. (Fla.1968), 208 So.2d 615, for example of the expanding development of nonmaritime liability concepts as potential grounds for predicating wrongful death benefits.

APPENDIX "C"

WRONGFUL DEATH STATUTES OF STATES

CALIFORNIA

Title 3, § 377, California Statutes Annotated

§ 377. Wrongful death of adults or certain minors; actions by personal representatives; death of wrongdoers; damages; consolidation of actions

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain as action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party.

FLORIDA

Title 21A, § 768.01, Florida Statutes Annotated
§ 768.01 Right of action for death

(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation or by the wrongful act, negligence, carelessness, or default, of any agent or any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) *and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation* (or the ship, vessel or boat), *which would have been liable in damages if death had not ensued shall be liable to an action for damages* (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), *notwithstanding the death of the person injured,* and although the death shall have been caused under such circumstances as amount in law to a felony.

(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

LOUISIANA

Title 5, Article 2315, Louisiana Statutes Annotated
Art. 2315. Liability for acts causing damage; survival of action

Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the

right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

If the above right of action exists in favor of an adopted person, it shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, for the space of one year from the death. However, this right of action shall survive in favor of the blood parent or parents to the exclusion of the adoptive parent or parents when at the time of the adoption the adopted was a major, or emancipated minor whose adoption was effected without the consent of the blood parent or parents evidenced in the act of adoption. In default of these, it shall survive in favor of the surviving blood brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters of adoptive parent, or parents, or adopted person, as the case may be.

MARYLAND

Article 67, § 1, Maryland Statutes Annotated

§ 1. Liability notwithstanding death

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or de-

fault is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the vessel or person who would have been liable if death had not ensued, or the executor or administrator of the said person who would have been liable in case of the death of the said person who would have been liable, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony and if death ensues as a result of wrongful act, neglect or default of a vessel, suit may be brought in rem against said vessel in any court of competent jurisdiction; provided, however, that any such action against the executor or administrator of the said person who would have been liable shall be commenced within six calendar months after the date of the qualification of the executor or administrator of the said person who would have been liable.

NEW JERSEY

Chapter 31, Sec. 2A:31-1, New Jersey Statutes Annotated

2A:31-1. When action lies

When the death of a person is caused by a wrongful act, neglect or default; such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

NEW YORK

Article 5, § 130, New York Statutes Annotated

§ 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

OREGON

§ 30.020, Actions and Suits in Particular Cases, Oregon Statutes Annotated

§ 30.020 Action by personal representative for wrongful death.

When a death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $25,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.

SOUTH CAROLINA

Chapter 23, § 10-1951, South Carolina Statutes Annotated
§ 10-1951. Civil Action for wrongful act causing death

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

TEXAS

Title 77, Article 4671, Texas Statutes Annotated
Article 4671. 4694, 3017, 2894 Cause of action

No agreement between any owner of any railroad, street railway, steamboat, stage-coach or other vehicle for transporting passengers or goods, or any industrial or public utility plant, or other machinery, and any person, corporation, trustee, receiver, lessee joint stock association or other person in control of, or operating the same, shall release such owner, person, trustee, lessee; corporation or joint stock association from any liability fixed by the provisions of this article. An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:

1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of another person, association of persons, joint stock company, corporation or trustee or receiver of any person, corporation, joint stock company, or association of persons,

his, its or their agents or servants, such persons, association of persons, joint stock company, corporation, trustee or receiver, shall be liable in damages for the injuries causing such death. The term "corporation," as used in this article, shall include all municipal corporations, as well as all private and public and quasi public corporations, except counties and common and independent school districts.

2. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of the proprietor, owner, charterer or hirer of any industrial or public utility plant, or any railroad, street railway, steamboat, state-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, wrongful act, neglect, carelessness, unskilfulness or default of his, their or its servants or agents, such proprietor, owner, charterer or hirer shall be liable in damages for the injuries causing such death.

3. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness or default of the receiver, trustee or other person in charge of or in control of any railroad, street railway, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or any industrial plant, public utility plant, or any other machinery, or by the wrongful act, neglect, carelessness, unfitness, unskilfulness or default of his or their servants or agents, such receiver, trustee, or other person shall be liable in damages for the injuries causing such death, and the liability here fixed against such receiver, trustee, or other person shall extend to all cases in which the death is caused by reason of any bad or unsafe condition of the railroad, street railway or other machinery under the control or operation of such receiver, trustee or other person, and to all other cases in which the death results from any other reason or cause for which an action may be brought for damages on account of personal injuries, the same as if said railroad, street railway or other machinery were being operated by the owner thereof.

VIRGINIA

Article 3, § 8-633. Virginia Statutes Annotated

§ 8-633. Action for death by wrongful act

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. And any right of action which may accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured person.

Every action under this section shall be brought within one year after the death of the injured person, notwithstanding the provisions of § 8-24.

§ 5474. Actions and Suits, West Virginia Statutes Annotated

§ 5474.[5] Action for Wrongful Death

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party.

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NO. 175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,
Petitioner,
vs.
STATES MARINE LINES, INC., a corporation,
Respondent,
vs.
GULF FLORIDA TERMINAL COMPANY, a corporation,
Respondent.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Petitioner,

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STATES MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

On Petition for A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit below, *Moragne v. States Marine Lines, Inc., et al.,* (Pet. App. 1-2)[1] is reported at 409 F.2d 32 (5th Cir. 1969). The preceding opinion of the Supreme Court of Florida, answering the question certified by the United States Court of Appeals for the Fifth Circuit, *Moragne v. States Marine Lines, Inc., et al.,* (Pet. App. 3-15) is reported at 211 So.2d 161 (Fla. 1968).

[1] "(Pet.App.)" refers to the Appendix to the Petition for a Writ of Certiorari filed in this cause.

JURISDICTION

In its pertinent aspect, this litigation began when Petitioner, a widow, filed suit under the Florida Wrongful Death Act, Florida Statutes, §768.01, seeking money damages for the death of her husband from a shipowner. (Pet. App. 4). This Wrongful Death Act claim was set forth in two counts, the first alleging negligence, the second alleging unseaworthiness. (Pet. App. 4). On motion of the Respondent, States Marine Lines, Inc., the shipowner, the District Court dismissed the count based on unseaworthiness for the reason that such a cause of action was not within the contemplation of the Florida Wrongful Death Act. (Pet. App. 4). Leave to appeal interlocutorily was granted by the Fifth Circuit. Thereafter, the Fifth Circuit certified to the Supreme Court of Florida the following stipulated question (Pet. App. 1):

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

All the parties, including Petitioner, agreed that the question raised in the certificate was a question controlled and governed by the state law of the State of Florida. Thus, petitioner stated in its main brief to the Fifth Circuit (Brief of Appellant, p. 4):

> "The sole issue before this Court is an interpretation of the Florida Wrongful Death Act, F.S. 768.01."

And, Petitioner further stated in its reply brief (Reply Brief of Appellant, p. 3):

> "We readily agree with the Appellee that the Federal Courts must take the State Law as they find it, including its limitations. This is precisely the point the Appellant has been arguing. The State Law obviously *does* incorporate this action. The Statute was intended to incorporate this action, and this Court should be bound by the State Law."

Thereafter, the Supreme Court of Florida rendered its decision (Pet. App. 3-15) answering the certified question in the negative, after which the Fifth Circuit entered its decision affirming the District Court. (Pet. App. 1-2).

The present Petition for a Writ of Certiorari seeks review of that decision of the United States Court of Appeals for the Fifth Circuit. The Petitioner contends *now* that the Fifth Circuit erred in consulting and applying state law to determine whether a suit under the Florida Wrongful Death Act may be predicated on allegations of unseaworthiness. The Respondents[2] submit, and we will argue in the "Argument" portion of this brief, that the Petitioner has demonstrated no predicate for the assumption of jurisdiction by this Honorable Court in this cause. We submit that in applying state law, interpreted by the Supreme Court of Florida in this very case, the Fifth Circuit followed the precisely applicable pronouncements of this Court.

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[2] This Brief in Opposition is submitted on behalf of the Respondent, States Marine Lines, Inc., and the Respondent, Gulf Florida Terminal Company. The Respondent States Marine Lines, Inc., was the shipowner sued by Petitioner in the first instance. States Marine Lines, Inc. thereafter filed a Third Party Complaint against Gulf Florida Terminal Company, a stevedoring corporation, seeking indemnity for any liability imposed upon States Marine Lines, Inc. However, the positions of the two Respondents regarding the present Petition for Certiorari are identical and therefore they submit this brief jointly.

QUESTIONS PRESENTED

The Petitioner states, as the questions presented, the following (Petition, page 4):

"I) Does Article III, Section 2 of the Constitution of the United States require the uniform application of substantive admiralty law to actions for wrongful death brought under State Wrongful Death Acts arising out of maritime torts committed on navigable waters of the United States within the territorial jurisdiction of the states.

II) Does the uniformity of admiralty and maritime law as contemplated by Article III, Section 2 of the Constitution of the United States and federally developed maritime principles, in cases arising out of deaths occurring on navigable waters of the United States, prohibit the application of substantive state common law principles which are in conflict with substantive admiralty law.

III) Does the application of substantive state common law principles, which are in conflict with substantive federal admiralty principles, in determining the rights and liabilities of a longshoreman, killed upon navigable waters of the United States within the territorial jurisdiction of the State of Florida, contravene the provisions of Article VI of the Constitution of the United States."

We respectfully observe at this juncture that the Petitioner did not raise or present these questions in the Fifth Circuit, or in the Supreme Court of Florida, until after the unfavorable decision of the Florida Supreme Court. Prior to that time Petitioner strongly urged the application of State law "including its limitations".

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions deemed to be involved by Petitioner (Fla. Stat. §768.01; U.S. Const., Art. III, §2; U.S. Const., Art. VI) are set forth in the Petition at pp. 5-6.

STATEMENT OF THE CASE

The underlying facts and procedural history are adequately set forth in the Petition at pp. 6-9. In addition, the Respondents respectfully refer to the matter recited herein under the "Jurisdiction" heading.

ARGUMENT

Under this heading we will set forth the reasons for denying the writ in this cause. The fundamental basis of Respondents' position is that the rule applied by the Fifth Circuit, at the instance of all the parties, was in faithful accord with controlling law as announced by this Court and that it contravenes no federal constitutional requirement. Further, we submit that the Petitioner may not now object to the application of state law and state imposed limitations in this case since Petitioner urged and invited such application in the Fifth Circuit. We will argue these matters under separate subheadings below.

I. THE PETITTIONER AFFIRMATIVELY INVITED THE FIFTH CIRCUIT TO APPLY STATE LAW AND SHOULD NOT NOW BE HEARD TO COMPLAIN THAT STATE LAW WAS APPLIED.

Petitioner argued to the Fifth Circuit that Florida law, "including its limitations", should be applied in determining whether unseaworthiness allegations could support a suit under the Florida Wrongful Death Act. The Fifth Circuit and the parties recognizing that Florida law controlled, and there being no decision of the Florida Supreme Court on the point, the question was accordingly certified to the Florida Supreme Court. The Florida Supreme Court rendered its decision holding that the Florida Wrongful Death Statute does *not* contemplate an action predicated on the maritime doctrine of unseaworthiness. Now Petitioner wishes to "change horses" and contend that Florida law should not be followed. We submit that Petitioner should not be permitted to attack by Petition for Certiorari the very rule

Petitioner accepted and urged below. The rules governing the proper scope of appellate review indicate clearly that a litigant will not be permitted to invite and induce an inferior tribunal to adopt a particular rule or theory and then contend on appeal that such rule or theory should not have been adopted. See, e.g., *Safeway Stores v. Oklahoma Retail Groc. Asso.*, 360 U.S. 334, 79 S. Ct. 1196, 3 L. Ed.2d 1280 (1959); *Autrey v. Williams and Dunlap*, 343 F.2d 730 (5th Cir. 1965); *Holm v. American Ship Building Company*, 276 F.2d 201 (6th Cir. 1960), cert. den. 364 U.S. 819, 81 S. Ct. 53, 5 L. Ed.2d 50 (1960); *Corbin v. Baltimore & O. R.R.*, 234 F.2d 78 (6th Cir. 1956); *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5 (9th Cir. 1955).

The Petitioner presented the question to the Fifth Circuit as simply a question of interpretation of a Florida Statute. No provisions or requirements of the United States Constitution were raised or mentioned by Petitioner prior to the entry of the decision of the Florida Supreme Court. Only after that decision, which was unfavorable to Petitioner, did Petitioner raise any constitutional argument. In these circumstances, the statement of this Court in *Louisville & N. R. Co. v. Louisville*, 166 U.S. 709, 715-716, 17 S. Ct. 725, 41 L.Ed. 1173 (1897), is compelling:

> "The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. . . . It is now said that as the proper construction of the statute was definitely settled by the court of appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract . . . and because it denied the equal protection of the laws in contravention of the 14th Amendment, al-

though no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient."

In sum, we submit that the questions sought to be raised by Petitioner here were not properly preserved below, and, indeed, that the portion of the Fifth Circuit decision complained of here was invited and requested by Petitioner in its presentation of the appeal to the Fifth Circuit. Orderly judicial administration requires that Petitioner be bound by the position taken below.

II. THE DECISION SOUGHT TO BE REVIEWED CONTRAVENES NO FEDERAL CONSTITUTIONAL REQUIREMENT.

Under this subheading we assume, for purposes of argument only, that the questions raised by the Petitioner were properly preserved below. Even so assuming, we submit that the decision of the Fifth Circuit contravenes no federal constitutional requirement. Indeed, the decision is in keeping with controlling law.

There is no federal or maritime cause of action for death available to Petitioner. The Fifth Circuit simply held that since Petitioner was seeking to enforce a cause of action created by a Florida statute, there being no maritime or federal cause of action available at all, she would have to take the Florida cause of action subject to the limitations recognized by Florida as a part of the statute. In reaching this decision the Fifth Circuit was simply following the clear mandate of this Court. The often cited decision of this Court in *The "Tungus" v. Skovgaard*, 358 U.S.

588, 79 S. Ct. 503, 506, 3 L.Ed. 2d 524 (1959), restated the principle emphatically announced as early as 1886. In *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358 (1886), this Court said (119 U.S. 214):

> "[I]f the admiralty adopts the (State Wrongful Death) statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

We note Petitioner's present contentions that *Tungus* should now be overruled and replaced by the idea that the Courts in the judicial administration of state wrongful death acts (including state courts administering their own acts) should disregard the state-imposed limitations upon which enactment was conditioned; and that federal maritime principles should be imported into these acts even though they be contrary to the express intent of the enacting legislatures or the judicial interpretations of the acts. But this Court has for almost a century refused so to distort the solemn enactments of the various state legislatures or to disregard the considered interpretative decisions of the state high courts charged with the responsibility of interpreting state statutes. We submit that the principles announced by this Court in *Tungus* and *Harrisburg* were well reasoned and are deserving of continued application. It is worthy of note that the principle stated in *Tungus* has, according to our research, been followed at least 35 times by this Court, courts of appeals and district courts. We set forth a list of these decisions in the "Glossary" at the end of the brief.

Yet Petitioner urges here the wholesale repeal of this imposing body of case law. Such a change based on the suggested necessity of rigid uniformity in maritime law, is, we submit, entirely unjustified.

First, the application of state law in the present circumstances does not touch, affect or modify maritime law in any way. Maritime law simply does not extend into the area of non-seaman fatalities in state waters. Therefore there is no maritime law with which the normal administration of litigation under the Florida Wrongful Death Act might conflict. It should be stressed here, as in *Tungus* (79 S. Ct. at 507), that Congress, in enacting the maritime legislative pattern, has studiously withheld the operation of federal maritime law from the area of non-seaman state waterway fatalities. This field was left to the states exclusively.

Second, and perhaps most important, Petitioner's contention that maritime law demands absolute uniformity is unsound. Here we assume, for purposes of argument only, that maritime law is involved at all. This Court's most recent pronouncement on a related point shows that Petitioner's "Uniformity" argument is without merit. Thus, in *Rodrique, et al. v. Aetna Casualty & Surety Co.*, No. 436, October Term 1968, June 9, 1969, 37 Law Week 4505, this Court was called upon to determine the applicability of unique state law concepts, foreign to maritime law, to litigation arising from fatal accidents on a "Texas Tower" located on the high seas outside the territorial waters of Louisiana. After noting that the maritime statute (Death on The High Seas Act) was not available, this Court concluded it was altogether appropriate to apply all the provisions of the state law including those different from maritime law.

Moreover, unique state legal principles have historically been applied in federal legal schemes. For example, litigation under the Public Vessels Act (46 U.S.C. §§781 et seq.), which has a clear maritime flavor,

is in no such need of rigid uniformity that local state law principles cannot be applied. See, e.g., *Allen v. United States*, 338 F.2d 160 (9th Cir. 1964). Further, *Fonseca v. Prann*, 282 F.2d 153 (1st Cir. 1960), teaches that maritime law itself is so resilient that the local substitution of a workman's compensation remedy for Jones Act death benefits was acceptable. An argument similar to Petitioner's has been made to this Court in the context of "uniformity" as to employees and non-employees under the Federal Employer's Liability Act. The argument was rejected. See, *Crane v. Cedar Rapids & Iowa City Ry. Co.*, No. 791, October Term, 1968, May 20, 1969, 37 Law Week 4443.

Finally, Petitioner's position here cannot survive consideration of the terms of the Jones Act vis-a-vis death benefits and this Court's decision in *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L.Ed. 2d 199 (1968). In *Gillespie* a seaman had been fatally injured in Ohio waters because of alleged "unseaworthiness". A suit was brought under the Ohio Death Statute based on unseaworthiness. This Court held that the Jones Act (46 U.S.C. 688) was the exclusive remedy and noted that the Jones Act provided for death benefits *only upon proof of negligence*. Petitioner's entire position here is that the recovery of death benefits based on unseaworthiness is absolute dogma sacred to maritime law. Yet the Jones Act allows death benefits to a *seaman* (Petitioner's decedent was a shore-based longshoreman) only in case of negligence. Thus, the Florida Wrongful Death Statute is being assailed here for imposing precisely the same requirement as that imposed by the most prominent federal statute in the maritime field relating to personal injury and death.

SUMMARY

Under long-established rules Petitioner may assert claims for the death of her decedent upon exactly the same grounds as might be asserted in connection with any death occurring in Florida. Until the Florida Supreme Court's decision was announced Petitioner took the position that the question was simply one of Florida law. Only after the adverse decision by the Florida Supreme Court did Petitioner suggest the possibility of constitutional questions. There is no general maritime law covering death of a non-seaman in state waters. For this reason there can be neither state-federal conflict nor variation in remedy from state to state beyond what Congress and this Court have for generations accepted as proper.

Petitioner's three "questions presented" are in fact but one question stated in three slightly different forms. They come to this:

> "Will this Court, at this time, overrule its own decisions, repeal generations of precedent, disregard the clear intent of Congress that recovery for deaths of nonseamen in state waters be regulated by state law, and ignore or override the Florida Supreme Court's interpretation of the Florida Statute upon grounds which are contrary to controlling legislative and judicial precedent and which were not timely raised in the Courts below."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to Charles Jay Hardee, Jr., Esquire, of Hardee, Ott & Hamilton, 101 East Kennedy Boulevard, Tampa, Florida 33602, Attorney for Petitioner, to the Clerk of the Court of Appeals for the Fifth Circuit, and to the Clerk of the Supreme Court of Florida this_____day of July, 1969.

By: _____
Attorney

GLOSSARY

United States Supreme Court

Goett v. Union Carbide Corp., 361 U.S. 340, 342, 343, 80 S.Ct. 357, 358, 359, 4 L.Ed.2d 341 (1960).

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

PETITIONER,

v.

STATE MARINE LINES, INC., a corporation,

RESPONDENT,

v.

GULF FLORIDA TERMINAL COMPANY, a corporation,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

AMERICAN TRIAL LAWYERS ASSOCIATION
By DAVID B. KAPLAN
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PETITIONER,

v.

STATE MARINE LINES, INC., a corporation,
RESPONDENT,

v.

GULF FLORIDA TERMINAL COMPANY, a corporation,
RESPONDENT.

MOTION AND STATEMENT OF INTEREST OF THE AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

TO THE HONORABLE JUDGES OF THE COURT:

The American Trial Lawyers Association moves this Honorable Court for leave to file the attached brief in support of the position of the Petitioner.

Consent has been sought from counsel for all parties.

Counsel for the petitioner has given his assent. Counsel for the defendant respondent and counsel for the third-party respondent do not assent, but also do not oppose the filing of this amicus curiae brief.

The American Trial Lawyers Association is a national bar association whose membership exceeds 25,000 lawyers who are primarily engaged in the practice of law on behalf of plaintiffs in personal injury litigation. The admiralty section of this association includes most of the attorneys who specialize in the maritime personal injury law. These attorneys represent seamen, longshoremen and other maritime workers who are engaged in a hazardous industry, and, as such, are recognized as having a special status by virtue of legislation and decisions of the courts.

This Association and the people it represents are directly affected by the scope and application of state death statutes, and the effort to create a uniformity of remedy, as applied to cases involving the death of maritime workers on waters within the territorial jurisdiction of the various states. More specifically, this Association is vitally concerned with this appeal, not only for the instant case, but also for the effect this result will have on similar cases now existing within the State of Florida, or in other maritime states.

As a resolution of the issues in this case will materially affect the outcome of many others, it takes on a position of major importance to thousands of maritime workers, the maritime industry and the admiralty bar.

For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief of Amicus Curiae.

AMERICAN TRIAL LAWYERS ASSOCIATION
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

PETITIONER,

v.

STATE MARINE LINES, INC., a corporation,

RESPONDENT,

v.

GULF FLORIDA TERMINAL COMPANY,

RESPONDENT.

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Questions Presented

A. Whether or not a State Wrongful Death Act which does not include the ancient maritime doctrine of unseaworthiness is contrary to Maritime and Admiralty Law.

B. Whether or not the decision in *The Tungus* v. *Skovgaard* has survived.

C. How did the present complicated status of the law begin and where will it end?

A. A State Wrongful Death Act Which Does Not Include the Ancient Maritime Doctrine of Unseaworthiness is Contrary to Maritime and Admiralty Law.

Admiralty and maritime jurisdiction is part of the judicial power conferred upon the United States by the Constitution, which provides that:

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." The jurisdiction is exclusively federal. The purpose of the grant of federal power is to make and keep the maritime law essentially uniform and harmonious throughout the international and interstate relations of the nation. *Benedict on Admiralty,* Sixth Edition p. 1.

Although injured seamen had rights to maintenance, care and continued wages until the end of the voyage on prior lawful discharge regardless of fault or negligence, the state workmen's compensation legislation was also progressing in an effort to provide a sensible system of maintaining employees who sustained injuries during the course of their employment. It was inevitable that a conflict would arise between the maritime law and a state workmen's compensation statute which occurred in the case of *Southern Pacific Company* v. *Jenson,* 244 U.S. 205, 61 L.ed. 1086, 37 Sup.Ct.Rep. 524, (1917), and which held that state legislation may not introduce disharmonious elements which affect the uniformity of maritime law.

Subsequently, every time that Congress endeavored to delegate the domain of maritime law and jurisdiction to the states legislative power, it was struck down on the

basis that only the Federal Government by virtue of the Constitution had the authority in these matters in order to establish and maintain uniformity in maritime matters. It is understandable that in order to avoid as many rules of law as there are states, that the framers of the Constitution gave only to Congress the control of maritime matters to insure uniformity of dispensation.

This admirable design to maintain harmony upon all who are subject to the jurisdiction of the Admiralty, is it now successful?

The holding in the leading case of *The Osceola*, 189 U.S. 158, 175, 231 S.Ct. 483, 487, 47 L.ed. 760, clearly sets forth the admiralty rule that the vessel and owner are liable to the seaman for "injury caused by unseaworthiness of the vessel or its appurtenances, appliances and equipment."

Thereafter in an effort to enlarge the rights of seamen and provide a recovery based upon negligence, the Jones Act was enacted which pre-empted those separate state remedies based upon negligence and created uniformity of remedy for injuries or death based upon negligence. Of course, this new right did not exclude the traditional right of recovery for seamen based upon unseaworthiness. *Mahnich* v. *Southern S.S. Co.* 321 U.S. 96, 99, 64 S. Ct. 455, 457, 88 L.ed. 561.

The Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. Sec. 761-768 (1958 ed) was enacted to provide an admiralty remedy for wrongful death of a seaman or other person occurring on the high seas beyond a marine league from the shore of any state. By judicial interpretation the Act includes unseaworthiness as a basis of responsibility. *Chermesino* v. *Vessel Judith Lee Rose, Inc.*, (D.C. Mass. 1961) 211 F. Supp. 36, Aff'd (1st Cir.) 317 F.2d 927, Cert. den. (1963) 375 U.S. 931.

This body of law continued to develop on a harmonious basis with the theme of uniformity intertwined throughout

with the decision in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; 66 S. Ct. 872; 90 L.ed. 1099, wherein it was held that stevedores or longshoremen injured aboard a ship are within the traditional protection afforded to seamen by admiralty and that "the fortuitous circumstance" of their employment by one other than the owner did not relieve the shipowner from responsibility, since the worker was doing a seaman's work and incurring a seaman's hazards.

The next logical step would be the development of a uniform maritime right for the death of a person not a seaman killed within a marine league from the nearest state. The decision in the case of *The Tungus* v. *Skovgaard* 358 U.S. 588; 79 S. Ct. 503; 3 L.ed 2d 524 which was, incidentally, a 5-4 decision and was a complete deviation from the concept of uniformity of maritime law so tenaciously adhered to in prior decisions. The probability is that the majority decision was enunciated because it was not conceivable that the ancient and deep-rooted concept of unseaworthiness could or would be ignored by any state, but unfortunately the unbelievable has occurred.

Although it was not anticipated the *Tungus* decision has provided the vehicle in which certain states applying their own state wrongful death statutes have deleted from the maritime worker a basic right to the extent that a maritime worker killed in one jurisdiction may have his rights prejudiced merely because of the fortuitous circumstances of the place of the happening of the accident. This is as discriminatory a situation as the mind can conjure, and in direct conflict with the underlying principle of maritime uniformity.

The national interest in creating and maintaining an effective merchant marine to deal with increased commercial activities relating to trade in territorial waters requires a reconsideration of the Court's position which permits a state to misinterpret a basic tenet of the admiralty

and to take away from a maritime worker's dependents rights that they would ordinarily be entitled to.

Since waterfront workers injured by even shore based equipment used to load and unload ships are covered by a warranty of seaworthiness. *Huff* v. *Matson Navigation Co.* (9th Cir. 1964), 338 F.2d 205, cert. den. 380 U.S. 943; *Spann* v. *Lauritzen* (3rd Cir. 1965), 344 F.2d 204, cert. den. 382 U.S. 1000 . . . . . because the work is held to be in the ship's service, *Seas Shipping Co.* v. *Sieracki* (1964), 328 U.S. 85, 89; *Crumady* v. *The Joachim Hendrik Fisser* (1959), 358 U.S. 423, 427 and *Italia Societa* v. *Oregon Stevedoring Co.* (1964), 376 U.S. 315, 323, then to reach the illogical next step that the warranty only extends in the event of an injury but not in the event of a death is unconscionable.

Certainly this ludicrous position is untenable and as the federal courts do have broad jurisdiction in cases of admiralty and maritime jurisdiction and as the law is designed to correct inequities that occur, then the Court should conclude that a change is necessary.

B. The Tungus v. Skovgaard Decision Has Not Survived.

Time has eroded the *Tungus* case due to that decision's basic fault. In the case of *Goett* v. *Union Carbide Corporation*, (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L.ed 2d 341, where the deceased fell from a river barge and drowned and an action was brought in admiralty against deceased's employer and owner of barge to recover for the death. It was determined that since the Court of Appeals did not specifically state whether it relied upon the West Virginia Wrongful Death Statute or the general maritime's concepts of negligence and unseaworthiness, that the case should be remanded to the Court of Appeals for determination.

The foregoing decision clearly reflects the strain of the attempt to comply with the *Tungus* decision and yet provide sensible ground rules for the decisions concerning the Wrongful Death Statutes of the various states and their possible offensiveness to the Admiralty and Maritime Law.

The issue was also treated in the case of *Hess* v. *United States,* (1960) 361 U.S. 314, 80 S. Ct. 341, L.ed 2d 305, wherein the question to be decided was whether the State Wrongful Death Act and/or the Employers' Liability Law could be applied to a claim for death occurring in navigable waters within the territorial district of a state. The Court held that The Employer's Liability Act could be applied and in support stated, that although the question whether a State Wrongful Death Act might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce, the Oregon statute did not present such a problem. In fact, the particular statute contained provisions more consonant with traditional principles of admiralty than the State's Wrongful Death Act.

The obvious effect of this decision is that the Admiralty and Maritime Law must keep a watchful eye on the various states so that no infringements may be made on this basic concept.

An interesting confirming opinion presented in the *Hess case,* supra exposing this problem was set forth at p. 347:

> "The Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan join the opinion of the Court, but solely under compulsion of the Court's ruling in The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, L. ed. 2d 524. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that the state law is the measure of recovery when it helps the defendant, as in Tungus, and is not

> the measure of recovery when it militates against the defendant as it does here. However, they note their continued disagreement with the ruling in The Tungus, and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers."

Since the *Hess* case permitted a selection between two state statutes, it is obvious that the decision has at least extended *Tungus* so that there is no requirement that only the State Wrongful Death Statute shall be applied. The underlying motivation was that "the particular statute contained provisions more consonant with traditional principles of admiralty than the State's Wrongful Death Act."

Our legislative history as well as logic dictates that neither Congress by statute nor the Judiciary by precedent would intentionally eliminate or restrict the then-existing remedies based upon unseaworthiness. Therefore, we are left with the conclusion that the present anomalous state of the law was not anticipated. The shipowner is not really affected by allowing recovery for death occurring within the territorial waters of a state, since he has the constant burden of maintaining a seaworthy vessel. Thus, to permit the continuation of this legal anomaly is totally without merit.

As Judge Goldberg so cogently stated in his dissent in the *Gillespie* v. *United States Steel Corporation* (1964) 379 U.S. 148, 166; 85 S. Ct. 308, 318:

> "'STARE DECISIS does not mean blind adherence to irrational doctrine. The very point of STARE DECISIS is to produce a sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations. I should think that by allow-

ing a remedy where one is needed, by eliminating differences not based on reason, while still leaving the underlying scheme of duties unchanged, this sense of security will not be weakened but strengthened."

C. The Present Complicated Status Of The Law Began With *The Harrisburg* And Should End With *Moragne*.

The phrase "They are products of their environment" has been applied in description of the vilest criminal to the most expert artist in an endeavor to explain the subject's motivation. The same principle is applicable to an explanation of some of our jurisprudence.

In the year 1886, the case of *The Harrisburg*, 119 U.S. 199, was decided holding that there was no action for death in the absence of statute under the general maritime law and also that the state Statute of Limitations of one year was appropriate barring the action.

It is of crucial importance to comprehend that the sociological drive of that era was to retain the state's separate sovereignty because of the underlying concern that the federal government would usurp the state's powers. However, analysis of that concept does not stand the test of scrutiny by today's standards.

The more modern jurisprudence dictates that the federal government must concern itself with the decisions of the separate states, in order to provide a fair and cohesive form of legal precedents. The decisions in the field of civil rights for example, clearly depict the necessity for the overseeing of our legal concepts by the federal judiciary.

As was stated in a very recent decision abrogating governmental immunity, *Perkins* v. *State of Indiana*, (1969) 251 N.E.2d 30

> "The argument that the legislature — not the Court — is the one to make the change, is answered by the fact that the principle was created by the courts as part of the common law, and if error exists or if the principle has become antiquated, it is the duty of the Court to change it."

The judicial process has sail as well as anchor. If judges have slammed the courtroom door without legislative aid, they can likewise re-open them without legislative help. When judges review past mistakes without fear and excise them without reluctance they become a positive educational force for the country in reinterpreting those moral values wrapped in the language of legal commands. In this greatest of functions judges hold up to all students of the law the "habitual vision of greatness."

There is no question that our Admiralty Jurisprudence is what the judge sitting in Admiralty wants it to be. The Admiralty judges have patterned their decisions based upon equity and with absolute acuity keyed to the changing needs and desires of the community.

In the case of *Kossick* v. *United Fruit Co.*, (1961) 365 U.S. 731, 81 S. Ct. 886; wherein a shipowner agreed to hold itself responsible for inadequate or improper treatment at a Public Health Service Hospital and the seaman alleged that he had been injured by said treatment. The shipowner then countered by saying that the state Statute of Frauds barred this claim. The decision not only concluded that it was a maritime contract, but that the state Statute of Frauds was not applicable thereby demonstrating that a state act restricting the Maritime or Admiralty Law must fail.

In *Mahnich* v. *Southern S.S. Co.* (1944) 321 U.S. 96, 64 S. Ct. 455; the Court sitting in Admiralty held that, notwithstanding the fact that there was good rope aboard, the fact that the mate selected rope to be used for a staging

and which was not suitable thereby causing injury rendered the vessel unseaworthy.

Here again, because of the Court's position enunciated time and again that the seamen are deemed to be Wards of the Admiralty and because of the rigorous discipline of the sea, as well as the hazards and conditions which he must accept, molded and extended the law to provide protection for the seaman.

A far-reaching decision wherein an Admiralty Court recognizing that the dominant intent of Congress in enactment of the Longshoremen's and Harbor Workers' Compensation Act was to help longshoremen, construed the said Act as not to restrict the longshoreman from his remedy in an action against the shipowner based upon unseaworthiness notwithstanding that coverage existed under the Longshoremen and Harbor Workers' Act. *Reed* v. *Steamship Yaka*, (1963) 373 U.S. 410, 83 S. Ct. 1349.

If the Admiralty and Maritime Law is capable of fashioning a new remedy when one is needed, strike down state doctrines offensive to the Admiralty and Maritime Law when necessary, and provide fair and equitable treatment to all connected with maritime activity because of the inequality of bargaining power, then how can the ancient and outlived doctrine of *The Harrisburg* be permitted to cloud and taint the constant quest for enlightenment. The answer is, obviously, it cannot continue and should be graciously put to rest forever after having served for many years.

Since law should be active and dynamic and not a frozen mold of ancient ideas, it must change with the times, the needs and as society grows, so that in the broader views of the problem decisions must be made anew in trying to determine whether the reason for the rule continues to survive.

As Oliver Wendell Holmes in a discussion, of early

forms of liability in his "Common Law", pp. 36, 37, 1881 Ed. makes this statement with reference to its development:

> "... The truth is that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

Conclusion

For the foregoing reasons, The American Trial Lawyers Association respectfully asks this Court to reject the archaic concepts heretofore expounded due to pressures of that era, and to adopt a much more modern and realistic approach to create uniformity in the Admiralty and Maritime Law.

AMERICAN TRIAL LAWYERS ASSOCIATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this motion and brief have been furnished by mail to John W. Boult, Esquire, of Fowler, White, Collins, Gillen, Humkey & Trenam, Post Office Box 1438, Tampa, Florida 33601, Attorneys for Appellee, States Marine Lines, Inc., and to David C.G. Kerr, Esquire, of Macfarlane, Ferguson, Allison, Kelly & Himes, Post Office Box 1531, Tampa, Florida, 33601, Attorneys for Appellee, Gulf Florida Terminal Company, and C.J. Hardee, Jr., Esquire of Hardee, Ott & Hamilton, 101 East Kennedy Boulevard, Tampa Florida, 33602 Attorneys for Appellant.

Said service was made on December 23, 1969.

DAVID B. KAPLAN

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A.

OPINIONS BELOW

The petitioner herein, PETSONELLA MORAGNE, seeks a review of the judgment and decision of the United States Court of Appeals for the Fifth Circuit in the case of *Moragne v. States Marine Lines, Inc.*, (5th Cir. 1969) 409 F. 2d 32, (A.55), which affirmed an Order of the United States District Court for the Middle District of Florida, striking from the plaintiff's complaint a count which alleged a cause of action based on unseaworthiness (A.13). The Court of Appeals for the Fifth Circuit adopted an opinion and decision of the Florida Supreme Court (A.27) answering a certified question (A.22) submitted to it by the Court of Appeals in *Moragne v. States Marine Lines, Inc.*, (Fla. 1968) 211 So. 2d 161, (A.27).

B.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered April 1, 1969 (A.57). Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1); 28 U.S.C. § 2101 (c). The petitioner seeks review, by way of certiorari, of the decision and judgment of the United States Court of Appeals for the Fifth Circuit holding that the Florida Wrongful Death Act does not encompass an action for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on navigable waters of the United States within the territorial jurisdiction of Florida. The Court of Appeals' decision is based upon the answer to a certified question given by the Florida Supreme Court (A.27). The Court of Appeals adopted Florida law.

The Court of Appeals made it clear in its decision that it felt bound by *Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, and construed the decision in that case to require the Court of Appeals to look to Florida substantive law in reaching its decision.

The petitioner herein contends that the present status of the holding of this Court in *Tungus v. Skovgaard, supra,* is confusing and equivocal. For a prime example of this confusion see *Hornsby v. Fishmeal Co.*, (DC WD La. 1968) 285 F. Supp. 990, 993. Also see *Igneri v. Cie de Transports Oceanigues*, (2d Cir. 1963) 323 F. 2d 257, *cert. denied* 376 U.S. 949, 84 S. Ct. 965, 11 L. Ed. 2d 969 (1964); *Alcoa Steamship Co. v. Charles Ferran & Co.*, (5th Cir. 1967) 383 F. 2d 46, *cert. denied* 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968); *Kenney v. Trinidad Corp.*, (5th Cir. 1965) 349 F. 2d 832, *cert. denied* 382 U.S. 1030, 86 S. Ct. 652, 15 L. Ed. 2d 542 (1966); and *United New York and Sandy Hook Pilots Assn. v. Rodermond Industries, Inc.*, (3rd Cir. 1968) 394 F. 2d 65. In *Tungus*, the majority of the Supreme Court originally, in a 5-4 decision, clearly held that the state's substantive law would apply in an action brought under the state's wrongful death act. Since the original opinion in *Tungus v. Skovgaard, supra,* three of the five Justices who constituted the majority of the Supreme Court have either receded from or qualified their reasoning in that case. The Court of Appeals, nevertheless, felt bound by the original opinion.

Since the decision in *Tungus v. Skovgaard, supra,* the overwhelming majority of the courts that have considered the question, i.e. whether a cause of action may be maintained based upon unseaworthiness under the various state statutes, have concluded that such State Wrongful Death Statutes do incorporate a cause of action for unseaworthiness and do in-

corporate federal admiralty law. Thus, the holding of the Court of Appeals defining the application of substantive law under the Florida Wrongful Death Act is in conflict with many decisions of other circuit courts construing the death acts of other states.

Additionally, petitioner contends that the construction given to the Florida Wrongful Death Act by the Court of Appeals for the Fifth Circuit and the Florida Supreme Court contravenes Article III, Section 2 of the Constitution of the United States, and contravenes Article VI of the Constitution of the United States.

C.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1) Florida Statutes, 768.01—Right of action for death —(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation *(or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon)*, and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action *(or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her)* and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation *(or the ship, vessel or boat)*, which would have been liable in damages if

death had not ensued shall be liable to an action for damages *(or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam)*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto. (Emphasis added.)

II) Constitution of the United States, Article III, Section 2:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority . . . to all cases of admiralty and maritime jurisdiction.

III) Constitution of the United States, Article VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

D.

QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I) Does Article III, Section 2 of the Constitution of the United States require the uniform application of substantive

admiralty law to actions for wrongful death brought under State Wrongful Death Acts arising out of maritime torts committed on navigable waters of the United States within the territorial jurisdiction of the states?

II) Does the uniformity of admiralty and maritime law as contemplated by Article III, Section 2 of the Constitution of the United States and federally developed maritime principles, in cases arising out of deaths occurring on navigable waters of the United States, prohibit the application of substantive state common law principles which are in conflict with substantive admiralty law?

III) Does the application of substantive state common law principles, which are in conflict with substantive federal admiralty principles, in determining the rights and liabilities of a longshoreman, killed upon navigable waters of the United States within the territorial jurisdiction of the State of Florida, contravene the provisions of Article VI of the Constitution of the United States?

IV) Should the Supreme Court overrule *The Harrisburg*, 119 U. S. 199?

E.

STATEMENT OF THE CASE

On December 31, 1964, Edward Moragne, Sr., a longshoreman, in Tampa, Florida, was killed while working on board the PALMETTO STATE, a vessel owned by the respondent States Marine Lines, Inc., when a hatch beam over hatch No. 4 on the vessel became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the No. 4 hold striking the deceased in the head killing him almost instantly.

Subsequently, his widow the petitioner, Petsonella Moragne, for herself and her two minor children, and as personal representative of the Estate of Edward Moragne, Sr., brought an action against the vessel owner, States Marine Lines, Inc., pursuant to the Florida Wrongful Death Act, 768.01 (A.1). The defendant, States Marine Lines, Inc., removed the action to the United States District Court for the Middle District of Florida on the Basis of diversity jurisdiction (A.6). A motion to remand the action to the State Court was subsequently denied. Petitioner, in Count II of her complanit (A.4), alleged a cause of action based upon the unseaworthiness of the vessel PALMETO STATE.

Upon motion of the shipowner, States Marine Lines, Inc., to dismiss Count II of the complaint based upon unseaworthiness (A.12), the District Court dismissed the Count from the complaint but in the court's order (A.13) stated that there was involved "a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate determination of this litigation." (A.14).

Petitioner requested leave of the United States Court of Appeals for the Fifth Circuit to take an interlocutory appeal pursuant to 28 U.S.C. §1292. Such leave was granted by the Court of Appeals on October 28, 1966 (A.15). The respondent herein then requested the Court of Appeals to certify the question of law involved to the Florida Supreme Court (A.17) and over petitioner's objection (A.19) the Court of Appeals did on August 11, 1967, forward its certificate to the Florida Supreme Court (A.22). In the certificate transmitted to the Florida Supreme Court by the Court of Appeals for the Fifth Circuit, the question of law to be answered was stated as follows:

"Does the Florida Death by Wrongful Act Statute

give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of longshoremen caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Florida Supreme Court, by its decision, answered this question in the negative on May 29, 1968. Rehearing was denied by the Florida Supreme Court on July 3, 1968 (A.44).

Petitioner then filed an extraordinary motion in the United States Court of Appeals for the Fifth Circuit asking the Court of Appeals to hold that the Florida Death by Wrongful Act statute did incorporate an action for unseaworthiness by virtue of federal maritime principles and to hold that the Florida Supreme Court was correct in deciding that the Florida Death by Wrongful Act statute did provide a remedy for death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida but that the Florida Supreme Court was incorrect in holding that the substantive common law principles of Florida followed such remedy and were paramount and superceded the federal maritime law regarding the substantive rights and liabilities of the parties (A.45).

The Court of Appeals for the Fifth Circuit heard oral argument on this extraordinary motion on October 28, 1968, and accepted supplemental briefs addressed to the constitutional issues involved (A.45).

On April 1, 1969, the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court striking the unseaworthiness count from plaintiff's complaint and said:

"No useful purpose will be served by additional review of pertinent authority on the issue of law pre-

sented in this appeal. It is sufficient to state that in *Tungus v. Skovgaard,* (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action of unseaworthiness is a question to be decided by the courts of that state." (A.56).

The United States Supreme Court granted the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on November 10, 1969. (Note: The Florida Supreme Court likewise held contributory negligence to be a complete bar to recovery for wrongful death occurring upon navigable waters located within the State of Florida. Bilbrey v. Weed, (1968) 215 So. 2d 479, cert. den. 394 U.S. 1018, 89 S. Ct. 2097, 23 L. Ed. 2d 43, reh. den. June 16, 1969.

F.

SUMMARY OF ARGUMENT

The decision and judgment of the United States Court of Appeals for the Fifth Circuit in this case contravenes Article III, Section 2 and Article VI of the Constitution of the United States in that the Court of Appeals, in deciding this case, relied upon the majority opinion of this Court in *M/V Tungus v. Skovgaard,* 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, and allowed the Supreme Court of Florida to decide the substantive law applicable to maritime deaths occurring on navigable waters of the United States within the territorial limits of the State of Florida. The Supreme Court of Florida held that under the Florida Wrongful Death Act the warranty of seaworthiness did not apply to such a maritime death. The majority opinion of this Court in *Tungus* was wrong and the Supreme Court should recede from that opinion. Three Justices of the five-member majority have

since substantially qualified the majority holding in *Tungus* and there presently exists confusion among the lower courts as to the present meaning of *Tungus*.

The death statutes of all the major maritime states which have been construed since the court's decision in *Tungus* have been held to incorporate substantive admiralty law, except Florida in the instant case.

The instant decision violates the uniformity of maritime law required by the Constitution and the interpretation of the Constitution by the Supreme Court in prior cases.

Florida stands alone among the major maritime states in denying to the widow and children of a deceased longshoreman killed upon navigable waters of the United States the benefit of the maritime doctrine of unseaworthiness and comparative negligence.

The Constitution forbids the delegation of power to the states to formulate admiralty substantive law which conflicts with existing maritime law as decided by the Supreme Court or by Congress.

The Supreme Court requested the parties to brief the question of whether *The Harrisburg*, 119 U.S. 199, should be overruled. Petitioner contends that whether or not the Court overrules *The Harrisburg*, the Court should recede from the majority opinion in *Tungus* and should reverse the instant case and remand the case to the Court of Appeals for the Fifth Circuit with instructions to decide the case upon established principles of maritime tort law.

The decision of the Supreme Court in *The Harrisburg* was wrong in that the Court engrafted into maritime law a thoroughly discredited doctrine of the common law, i.e., there

is no right of action for wrongful death, and in so doing abandoned traditional principles of the maritime law of the United States which looked to the civil law rather than the common law for guidance.

The decision in *The Harrisburg* established a precedent for the development of nonuniformity in the area of wrongful death by requiring the courts to look to state statutes in order to find a remedy for wrongful death. The body of law that has developed since *The Harrisburg* and largely since *Tungus* is conflicting and confusing.

Admiralty has traditionally found or created remedies where necessary to accomplish equity and justice as, for instance, in impleader, unseaworthiness and comparative negligence.

The Supreme Court should overrule the long-standing rule of *The Harirsburg* since it is clearly wrong, as the Court has done in previous cases regarding other matters.

There are some practical considerations to overruling *The Harrisburg* which petitioner seeks to call to the Court's attention.

Petitioner concludes that the Supreme Court should recede from the majority opinion in *M/V Tungus v. Skovgaard* and should reverse the instant case and hold that established principles of maritime tort law govern all maritime tort cases whether the result is injury or death and that the states have no paramount right to substitute conflicting state law for established maritime principles. Petitioner further concludes that it is not necessary for the Court to overrule *The Harrisburg* in order to reverse this case. However, petitioner further concludes that *The Harrisburg* was wrong and should be reversed

and the Court should declare that there is a remedy rooted in the maritime law for wrongful death of persons killed as a result of maritime torts.

G.

ARGUMENT

I.

THE M/V TUNGUS V. SKOVGAARD WAS WRONG

The decision and judgment of the United States Court of Appeals for the Fifth Circuit contravenes and violates Article III, Section 2 of the Constitution of the United States. It decides an important issue in a manner which in all probability is not in accordance with the law as this Court would now pronounce it. It applies Florida substantive common law tort principles to a case of death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. The petitioner contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determines the rights, obligations and liabilities of the parties in a case involving a maritime death occurring upon navigable waters of the United States except to the extent that it provides a remedy in addition to other remedies provided by admiralty or federal law for the enforcement of duties rooted in admiralty law.

In this case, the Court of Appeals, adopting the decision of the Florida Supreme Court, has extinguished the doctrine of unseaworthiness in cases of death occurring upon navigable waters of the United States within the territorial jurisdiction of Florida.

If the Florida Supreme Court or the Florida Legislature can constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law in contravention of Article VI of the Constitution of the United States.

The Court of Appeals failed to distinguish between the *remedy* for an action based upon wrongful death provided by the Florida Statute (which does not conflict with existing admiralty remedies) and the *substantive law* applicable to torts occurring upon navigable waters of the United States. Here the Court of Appeals delegated to the Florida Supreme Court the authority to determine by what substantive law principles deaths occurring on navigable waters of the State of Florida would be defined and governed.

In so doing, the Court of Appeals stated that it felt constrained to follow the majority opinion of the Supreme Court in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524.

For an illuminating discussion of the Florida death statute, vis a vis maritime law, see the dissent of Circuit Judge John R. Brown in *Emerson v. Holloway Concrete Products*, (5th Cir. 1960) 282 F. 2d 271, at page 278.

In *Tungus*, the Chief Justice and Justices Black, Douglas and Brennan felt that admiralty law must be applied uniformly and that the State Wrongful Death Statutes must be restricted to furnishing a remedy for wrongful death; that the states had no right to furnish substantive law conflicting with established admiralty law.

Of the Justices in the majority in *Tungus*, Justice Whitaker apparently receded from the majority opinion in *Tungus*

in *Goett v. Union Carbide Corp.* (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L. ed. 2d 341, when he said:

> "The court's opinion says that *The Tungus v. Skovgaard,* (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, 'decided that it was a question of State law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding in a maritime tort death case the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' *I do not understand the Tungus case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.*
>
> * * *
>
> And when, in a case encompassed by the terms of the State's Wrongful Death Statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which 'if death had not insued' would have redressed it." (emphasis supplied) (pages 345-346).

In *Hess v. U. S.,* (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. ed. 2d 305, Justices Harlan and Frankfurter, who joined in the original majority opinion in *Tungus,* apparently qualified their holding in *Tungus:*

> "The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful

death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.'

I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive provisions is, in any event, not offensive to maritime law." (p. 322-323).

In both *Goett* and *Hess* the Chief Justice and Justices Black, Douglas and Brennan, joined with the authors of those decisions solely under compulsion of the majority holding in *Tungus* and expressed their continuing disagreement with the ruling in *Tungus*.

In view of the qualifications placed upon the decision in *Tungus* by three of the Justices, constituting the original majority, it is now difficult to tell what *Tungus* actually stands for. Compare *Tungus* with the Court's language in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143, where this court said:

"His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a State-created remedy for his right, federal maritime law would be controlling. While States may sometimes supplement federal maritime policies, a State may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

The Court of Appeals for the Fifth Circuit, after spending considerable time, hearing oral argument and accepting supplemental briefs, concluded that it was bound by the original majority opinion in *Tungus* to accord to the State of Florida the right to decide what substantive law would apply to actions for death occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida.

Since the Court's decision in *Tungus*, the overwhelming majority of the courts which have considered the Wrongful Death Statutes of the various states have concluded that these statutes, dissimilar as they may be, in each instance incorporate admiralty substantive law.

It was only when the Florida Supreme Court handed down its opinion in the instant case that the fears of the Chief Justice and Justices Black, Douglas and Brennan, expressed in *Tungus*, came to fruition.

II.

THE LAW SINCE TUNGUS

Since this Court's decision in *Tungus*, the following courts have construed death acts of the various states to incorporate admiralty substantive law:

CALIFORNIA

Curry v. Fred Olsen Lines, 367 F. 2d 921 (9th Cir. 1966) cert. den. 386 U.S. 971, 87 S. Ct. 1165, 18 L. Ed. 2d 131 (1967)

LOUISIANA

Grigsby v. Coastal Marine Service, 235 F. Supp. 97 (WD La. 1964) affirm'd. in part, 412 F. 2d 1011, (5th Cir. 1969)

MARYLAND

Maryland ex rel Smith v. A/S Nabella, 176 F. Supp. 668 (DC Md. 1959)

Maryland ex rel Gladden v. Weyerhauser S.S. Co., 176 F. Supp. 664, (DC Md. 1959)

Metzger v. S. S. Kirsten Torm, 245 F. Supp. 227 (DC Md. 1965)

MICHIGAN

Hunter v. Dampsk A/S Flint, (DC ED Mich. 1967) 279 F. Supp. 701

NEW JERSEY

United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S. Ct. 517, 3 L. ed. 2d 541 (1959)

Petition of Marina Mercante Nicaraguense, S.D., 248 F. Supp. 15 (SD NY 1965); 364 F. 2d 118 (1966); cert. den. 385 U.S. 1005, 87 S. Ct. 710, 17 L. Ed. 2d 544; reh. den. 386 U.S. 929, 87 S. Ct. 851, 17 L. Ed. 2d 803 (1967)

NEW YORK

Cunningham v. Rederiet Vindeggen, A/S, 333 F. 2d 308 (2d Cir. 1964)

Clark v. Iceland S.S. Co., 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958)

Olsen v. New York Central Railroad Co., 341 F. 2d 233 (2d Cir. 1965)

OREGON

Hess v. United States, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960)

Tallmon v. Toko Kaium K. K. Kobe, (DC Ore. 1967) 278 F. Supp. 452

PUERTO RICO

Compania Transatlantica Espanola, S. A. v. Melendez Torres, 358 F. 2d 209, (1st Cir. 1966)

SOUTH CAROLINA

Anthony, Adm. v. International Paper Co., 289 F. 2d. 574, (4th Cir. 1961)

TEXAS

Vassallo v. Nederl-Amerik Stoomv Maats Holland, 344 S.W. 2d 421, (Tex. 1961)

VIRGINIA

Holley v. The Manfred Stansfield, 269 F. 2d 317 (4th Cir. 1959); cert. den. 361 U.S. 883, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1961)

Union Carbide Corp. v. Goett, 278 F. 2d 319 (4th Cir. 1960), cert. den. 364 U.S. 826, 81 S. Ct. 64, 5 Law Ed. 2d 55

It is indicated that Massachusetts would follow the same principle. *O'Leary v. United States Lines*, 215 F. 2d 708 (1st Cir. 1954); cert. den. 348 U.S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955); and *Turner v. Wilson Line of Mass.*, 242 F. 2d 414 (1st Cir. 1957).

The verbatim Statutes are set forth in Appendix "C" to the Petition for Writ of Certiorari in this cause.

Under the Death on the High Seas Act, 46 U.S.C.A. § 761, the federal courts have held that a right of action for unseaworthiness is incorporated within the terms of that act. *Montgomery v. Goodyear Tire and Rubber Co.*, 241 F. Supp. 447 (DC NY 1964); affmd. 392 F. 2d 777 (2d Cir. 1968); cert. den. 393 U.S. 841, 89 S. Ct. 121, 21 L. Ed. 2d 112 (1968); and *Chermesino v. Vessel Judith Lee Rose*, 211 F. Supp. 36 (DC Mass. 1962), affm'd. 317 F. 2d 927, (1st Cir. 1963), cert. den. 375 U.S. 931, 84 S. Ct. 333, 11 L. Ed. 2d 264 (1963).

Thus, Florida stands alone among the major maritime states in denying to the widow and children of a deceased longshoreman the benefit of the maritime doctrine of unseaworthiness and the benefit of the maritime doctrine of comparative negligence.

III.

THE MORAGNE DECISION VIOLATES UNIFORMITY

Uniformity of maritime law forbids such a result. In

Knickerbocker Ice Company v. Stewart, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of state workmen's compensation statutes to injuries and death occurring on navigable waters within territorial limits of the states and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law to interfere with its proper harmony and uniformity in its international and interstate relations.
>
> To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states — not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

'That we have a maritime law of our own, operative throughout the United States, cannot be doubted.

* * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654). (p. 160-161). * * *

Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166).

The decision in *Knickerbocker Ice Co. v. Stewart*, supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart*, supra, the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court,

following *Knickerbocker Ice Co. v. Stewart*, supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646.

In *Red Cross Line v. Atlantic Fruit Company*, (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, and the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

> "The 'right of a common law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124) * * *
>
> This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124).

The instant decision, which is contrary to all recent holdings by other courts, appears to arise over a confusion between remedies and substantive principles.

There is no question that the Florida Wrongful Death Act provides a remedy for wrongful deaths occurring upon navigable waters of the United States within the territorial jurisdiction of the State of Florida. It is also established law that this remedy carries with it all the burdens and limitations placed upon the remedy by the state.

The question is, whether or not the state may provide substantive law which conflicts with federal admiralty law to determine the rights and liabilities of the parties for whom the remedy is provided.

The remedy itself does not conflict with any principles of admiralty law. The Congress has not seen fit to legislate in this field or to provide a remedy for wrongful death within the states' territorial waters.

The substantive law governing torts occurring on navigable waters of the United States, however, is fixed and defined by federal law. Here the Court of Appeals has adopted state law which is in violent and direct conflict with the federal substantive law applicable to maritime torts.

If by legislation or court decision Florida may provide a remedy for disputes arising upon Florida's navigable waters where there is no existing remedy under federal law and then may provide the substantive law to go with the remedy where substantive law conflicts with federal law, then such state law becomes paramount to the federal maritime law and contravenes Article III, Section 2 and Article VI of the Constitution of the United States.

This is a result which the framers of the Constitution could not have intended. Clearly, federal law must remain paramount in the settling of disputes arising on navigable waters of the United States.

If the substantive law promulgated by the various states is applied to maritime disputes and is paramount to federal law, then the power of the United States in the maritime field is substantially damaged and one of the basic purposes of the original union of the states has been effectively demolished.

IV.

THE RULE OF THE HARRISBURG

In *The Harrisburg*, (1886) 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, the Supreme Court held: (1) that no remedy for wrongful death existed in the general maritime law as applied in the United States absent an applicable statute, and (2) that the courts would look to applicable state statutes to find a remedy for wrongful death and as a condition to the application of such state statutes would apply the state time limitation to such an action rather than the admiralty doctrine of laches.

The court, however, toward the end of the opinion, stated:

> "No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."

The rule established in *The Harrisburg*, i.e. that there is no remedy for wrongful death under maritime law, is re-

sponsible for the passage of the Death on the High Seas Act, 46 U.S.C. 761, and the Jones Act, 46 U.S.C. 688, and a large mass of confusing decisions culminating in *M. V. Tungus v. Skovgaard*, *supra*, and the cases attempting to construe that opinion.

The petitioner herein, while believing that *The Harrisburg* was wrongly decided and should be overruled, nevertheless strongly urges that the Supreme Court should recede from the majority opinion in *Tungus* and reverse the Court of Appeals' opinion and judgment in *Moragne*, whether or not the Court decides to overrule *The Harrisburg*, for the following reasons:

1. *The Harrisburg* does not purport to grant to the states authority to formulate admiralty substantive law in conflict with federal maritime law and is, therefore, not authority for the majority opinion in *Tungus*.

2. The decisions of the courts prior to *The Harrisburg*, and for that matter up to the decision in Tungus, universally applied maritime law to maritime disputes and refused to apply state law which conflicted with the general maritime law.

3. The Court in *The Harisburg* specifically declineed to rule upon the question whether a valid excuse, as applicable to the law of laches, would toll the operaion of the state statute of limitations.

Petitioner contends that even if state statutes of limitations are to be applied when the maritime law uses a state wrongful death statute as a remedy that the application of the statute of limitation of a state is far different from allowing the states to formulate substantive tort law governing

maritime torts when that state substantive law is in violent and direct conflict with the maritime law governing such maritime torts.

In *Just v. Chambers*, (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903, at page 388 this Court said:

> "With respect to maritime torts we have held that the state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

In the instant *Moragne case*, the common law of Floride is hostile to the characteristic features of maritime law in that it fails to recognize the established warranty of seaworthiness rooted in admiralty law and it holds contributory negligence to be a complete bar to recovery. *Bilbrey v. Weed*, (Fla. 1968) 215 So. 2d 479, cert. denied 394 U.S. 1018, 89 S. Ct. 2097, 23 L. Ed. 2d 43, reh. den. June 16, 1969.

V.

THE HARRISBURG WAS WRONGLY DECIDED

The decision of the Supreme Court in *The Harrisburg*, *supra*, was wrong for two reasons. First, the court engrafted into the maritime law of the United States a common law doctrine which has been thoroughly and generally discredited, that is, that there was no right of action for wrongful death.

Second, in looking to the common law, the court abandoned traditional principles of maritime law which would apply principles of equity and justice in tort law and would

look generally to the civil-code nations of Europe in the determination of maritime law.

VI.

THE COMMON LAW RULE OF ACTIO PERSONALIS MORITUR CUM PERSONA IS THOROUGHLY DISCREDITED

Dean William L. Prosser in the Law of Torts, 3rd Edition, page 920, Sections 120 and 121, discusses the origin of this rule.

> The origin of the rule that personal tort actions die with the person of the plaintiff or the defendant is rather obscure[2]—the more so as contract actions which were equally "personal" were held to survive the death of either.[3] The best conjecture on the subject is that it was a result of the development of the tort remedy as an adjunct and incident to criminal punishment in the old appeal of felony and the action of trespass which succeeded it. Since the defendant could not be punished when he was dead, it was natural to regard his demise as terminating the criminal action, and tort liability with it. If it was the plaintiff who died,the early cases usually were those of homicide, for which the crown executed the defendant and confiscated all his property, so that nothing was left for tort compensation; and if not homicide, it was still to be expected that lesser crimes should be redressed by the crown rather than the successors of the deceased.
>
> * * *

p. 923

"When the defendant's tort was the responsible cause of the plaintiff's death, the same rather uncertain historical reasons which barred the survival of previous torts arose to prevent any new cause of action in his representative or his estate based on the death itself. If it were conceded that killing the plaintiff was a tort toward him, he was none the less dead, and the tort died with him.[36] It is not so clear, however, that there was ever any adequate reason for denying an action to a third party, still alive, who had lost the services of the plaintiff by reason of his death; and it is possible that such an action might at one time have been maintained.[37] But in 1808 Lord Ellenborough, whose forte was never common sense, held without citing any authority that a husband had no action for loss of his wife's services through her death, and declared in broad terms that "in a civil court the death of a human being could not be complained of as an injury." [38] The decision was accepted and folowed, not without dissent, in England,[39] and notwithstanding a good start to the contrary,[40] in the United States.[41]

The result was that is was more profitable for the defendant to kill the plaintiff than to scratch him,[42] and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."

See Judge Sprague's comment in *Cutting v. Seabury*, (District Court, D., Mass. 1860) 1 Spr. 522, 23 L. Rep. 533, 6 Fed. Cases 1083, Case No. 3521.

Not only had the English Parliament some forty years before *The Harrisburg* passed what is known as Lord Campbell's Act, but each of the states had adopted some combination of survival and wrongful death remedial statutes to overcome the harsh rule of the common law.

That the common law rule of no action for wrongful death was and is basically wrong is not now disputed by any recognized authority.

VII.

MARITIME LAW EVOLVED PRINCIPALLY FROM THE CIVIL LAW

Benedict on Admiralty, 6th Edition, Volume 1 Says:

> "The maritime law is not a branch or outgrowth of the comon law but takes its character from the civil law."
>
> * * *
>
> "Jurisdiction is the power to adjudicate a case upon the merits and dispose of it as justice may require."

See further the discussion of sources of the jurisdiction beginning at page 6.

Benedict further says in the 6th Edition, Volume 4, page 358:

> "The admiralty law is indebted for many of its characteristics to the circumstances of the countries in which it was first administered. The countries that earliest reduced the law of the sea to a system, and adopted codes of maritime regulations,

having been countries in which the Roman or civil law prevailed, the principles of that great system of jurisprodunce were incorporated with, and gave character to, the maritime law; and so much were pure reason, abstract right, and practical justice mingled in that system, and so important was it that the general maritime law should be uniform and universal, that, in England, where the common law was the law of the land, the civil law was held to be the law of the admiralty, and the course of procedings in admiralty closely resembled the civil law practice."

There follows, beginning at page 359, a discussion of the development of maritime jurisdiction and at page 375 a discussion of the strife in England between the common law courts and the admiralty in the sixteenth and seventeenth centuries. The earlier cases decided in the United States by distinguished justices held to the principle that American maritime law derived essentially from the civil law and maritime principles would be applied based upon *pure reason, abstract right and practical justice.*

In *De Lovio v. Boit* (Cir. Ct. Mass. 1815) 2 Gall. 398, 7 Fed. Cases 418, Case No. 3776, Justice Story reviewed the history of the development of maritime law in a very learned opinion. After a thorough discussion of the course of the development of the maritime law in the United States, and with particular reference to the struggle between Lord Coke and the admiralty judges in England, Justice Story said:

p. 443

"At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the re-

A

strictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction."

In the *Sea Gull*, (Cir. Ct. Md. 1865) 21 Fed. Cases, page 909, Case No. 12578, Justice Chase in an admiralty action for wrongful death said:

"There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the fendal system and its forfeitures. * * *

"These latter authorities were approved of by Judge Sprague, in the case of Cutting v. Seabury. He observes that "the weight of authority in common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it." He adds: "It is not controverted

> that if a father be willfully and wronfully deprived of the services, society, and control of his minor son, he may maintain an action against the wrong-doer if the son survive. Why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost?" It is difficult to answer this question, and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

For an excellent discussion of the development of the civil law in Louisiana, derived from the Code Napoleon, see the opinion of Chief Judge John R. Brown in *Grigsby v. Coastal Marine Service of Texas,* (5th Cir. 1969) 412 F. 2d 1011, beginning at page 1023. Judge Brown points out in Note 16 on page 1024 that Article 1382 of the French Civil Code, which predated The Harrisburg by some 80 years or more, provides "Every act whatever of human agency which causes damages to another, obliges the person by whose fault that damage has occurred to repair it." Also see 6 Tulane Law Review, 1931-32, page 212, and The American Journal of Comparative Law, Volume 12, page 182 et seq., and 1 C. J. 1248 et seq. (A discussion of the origin and growth of American maritime law).

It is, therefore, apparent that the Supreme Court in *The Harrisburg* departed from a very substantial and distinguished jurisprudence in the United States which refused to engraft into maritime law restrictive doctrines of the common law of England. Worse, the court in *The Harrisburg* engrafted into maritime law a doctrine of the common law of obscure heritage, apparently based upon the single decision of Lord Ellenborough, a nisi prius judge, in *Baker v.*

Bolton, (1808) 1 Camp. 493, 170 Eng. Rep. 1033, "whose forte was not common sense" according to Prosser, and one which had been widely criticized even in that day.

VIII.

THE HARRISBURG INVITED NONUNIFORMITY

The decision in *The Harrisburg*, rejecting as it did a right of action for wrongful death rooted in maritime law and requiring a reliance upon state statutes which themselves abrogated the common law rule, in effect, invited the morass of conflicting nonuniform law which has resulted, including the majority opinion in *M/V Tungus v. Skovgaard*, supra, and culminating in *Moragne v. States Marine Lines, Inc.*, *Emerson v. Holloway Concrete Products*, (5th Cir. 1960) 282 F. 2d 271, cert. den. 364 U.S. 941, 815 S. Ct. 459, 5 L. Ed. 2d 372; *Koninklyke Nederlandsche Stoomboot Maalschappy*, N. V. *v. Strachan Shipping Co.*, (5th Cir. 1962) 301 F. 2d 741, rearq. den. 304 F. 2d 545, cert. den. 371 U. S. 921, 83 S. Ct. 288, 9 L. Ed. 2d 230; *Igneri v. Cie de Transports Oceaniques*, (2nd Cir. 1963) 323 F. 2d 257, cert. den. 376 U.S. 949, 84 S. Ct. 965, 11 L. Ed. 2d 969; *Allen v. U. S.*, (9th Cir. 1964) 338 F. 2d 160, cert. den. 380 U.S. 961, 85 S. Ct. 1104, 14 L. Ed. 2d 152; *United New York Sandy Hook Pilots Association v. Rodermond Industries, Inc.*, (3rd Cir. 1968) 394 F. 2d 65; *Petition of Alva Steamship Co.*, (2nd Cir. 1969) 405 F. 2d 962; *Grigsby v. Coastal Marine Service*, (DC WD La. 1964) 235 F. Supp. 97, (5th Cir. 1969) 412 F. 2d 1011; *McLaughlin v. The Dredge Gloucester*, (DC NJ 1964) 230 F. Supp. 623; *Safir v. Compagnie Generale Transatlantique*, (DC ND NY 1965) 241 F. Supp. 501; *McManus v. Lykes Brothers Steamship Co.*, (DC ED La. 1967) 275 F. Supp. 361; *Hornsby v. Fishmeal Co.*, (DC WD La. 1968) 285 F. Supp. 990; *McMilin v. U. S.*, (DC

Del. 1968) 290 F. Supp. 351; *Anapol v. Reading Company*, (DC ED Pa. 1968) 294 F. Supp. 429; *Simpson v. Knutsen*, (DC ND Cal. 1969) 296 F. Supp. 1308.

IX.

ADMIRALTY WILL CREATE A REMEDY WHEN NECESSARY

One of the remarkable and admirable characteristics of maritime law is the tradition that, like equity, admiralty will seek to do justice and is not necessarily bound by strict adherence to any traditional rule. The Constitution specifically says, "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." Pursuant to this authority, the courts have fashioned the rule of impleader, entirely a court-made rule. The courts have also promulgated and developed the right of seamen and other martime workers to a warranty from the shipowner of a seaworthy vessel. *The Osceola*, (1903) 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760; *Mahnich v. Southern S. S. Co.*, (1944) 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561. The courts also developed the doctrine of comparative negligence and refused to follow the common law rule of contributory negligence long before the passage of the Jones Act. *The Max Morris*, (1885) 24 F. 860, aff'd. 28 F. 881, 137 U.S. 1, 11 S. Ct. 29, 34 L. Ed. 586. The admiralty courts of this country derive from the constitution itself the power to formulate admiralty law apart from statutory law and the power to establish remedies in admiralty apart from statutes of either the United States or the respective states. In fact, in the earlier cases, previously cited, discussion was sometimes had concerning the power of Congress to pass statutes which might conflict with the traditional maritime law of the United States. Such statutes

have ben found unconstitutional when in conflict with the uniform application of admiralty law, as for example, the cases involving workmen's compensation laws previously cited in this brief.

X.

A MARITIME REMEDY FOR WRONGFUL DEATH

The Supreme Court should overrule *The Harrisburg* and find that there is a remedy in the maritime law for wrongful death without regard to any statutory enactments.

The Supreme Court has, on a number of notable occasions, reversed a prior decision which was clearly wrong. For example, in *Erie R. Co. v. Tompkins,* (1938) 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the Supreme Court overruled law established in *Swift v. Tyson,* (1842) 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865, and changed a rule of law that had existed since 1842 pursuant to which a very substantial body of law had accumulated. In 1954 the Supreme Court in *Brown v. Board of Education,* (1954) 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, overruled a principle of law which had existed since 1896. In each of these instances, and in others, the Supreme Court in its wisdom, reversed a rule of law of many years standing which at the time of reversal had become clearly and patently indefensible.

The rule of *The Harrisburg* is such a rule. Undoubtedly, the Supreme Court in 1886 could not foresee the results which would obtain from that decision.

It is now clear that the rule of *The Harrisburg* was not only wrong but has created such a confusion and inconsistency of decisions that it should be overruled.

The Supreme Court should declare, consistent with the natural development of the maritime law in this country, consistent with the historic development of that law, and consistent with "pure reason, abstract right and practical justice", that there is a remedy for wrongful death in maritime law and that "every act whatever of human agency which causes damages to another, obliges the person by whose fault that damage has occurred to repair it.'

XI.

PRACTICAL CONSIDERATIONS

Petitioner further contends that if the Court overrules *The Harrisburg*, then the Court should lay down some general guide lines as to future practice in matters concerning survival and wrongful death. Petitioner contends that any person damaged by the act of another should be entitled to bring an action to recover for those damages. Also, there is authority in the civil law, as well as in the Death on the High Seas Act, 46 U.S.C. 761, and the Jones Act, 46 U.S.C. 688, for such actions to be brought by a personal representative. As a guide line for the application of laches there is authority for the application of the three year limitation period prescribed by the Jones Act. *Flowers v. Savannah Machine & Foundry Co.*, (5th Cir. 1962) 310 F. 2d 135.

The peculiar result required to be reached in *Gillespie v. U. S. Steel Corp.*, (1964) 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199, following *Lindgren v. United States*, (1930) 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686, where the heirs of a dead seaman are deprived of the warranty of seaworthiness (fashioned to protect live seamen) in territorial waters, would be rendered naught.

H.

CONCLUSION

Petitioner concludes that the Supreme Court should recede from the reasoning of the majority of the court expressed in *M/V Tungus v. Skovgaard, supra,* and should reverse the United States Court of Appeals for the Fifth Circuit in this case and hold that established principles of maritime tort law govern all maritime tort cases whether the result is injury or death. The court should further hold that the State of Florida, or any state, may not substitute the state law or the common law for established principles of maritime law where the two are in conflict.

Although petitioner does not believe that a decision in this case requires the Supreme Court to overrule *The Harrisburg,* the Supreme Court requested petitioner to brief this question. Therefore, petitioner further concludes that the decision in *The Harrisburg* was wrong, has resulted in a confusing morass of conflicting decisions in attempting to apply state law for survival and wrongful death within the traditional confines of the maritime law and should, therefore, be overruled and that the Court should hold in accordance with the traditional principles of equity and justice of the maritime law that a remedy for wrongful death exists in the maritime law apart from any statutory enactments.

Respectfuly submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Brief of Appellant have been furnished by hand delivery this 31st day of December, 1969 to each of the following: William A. Gillen, Esquire, of Fowler, White, Collins, Gillen, Humkey & Trenam, 220 Madison Avenue, Tampa, Florida, Counsel for the Respondent, States Marine Lines, Inc.; George W. Ericksen, Esquire, of Macfarlane, Ferguson, Allison & Kelly, Counsel for the Respondent, Gulf Florida Terminal Company; and The Honorable Erwin N. Griswold, Solicitor General, U. S. Department of Justice, Constitution Avenue and 10th Street, N. W., Washington, D. C.; and one copy by mail this 30th day of December, 1969, to the Clerk of the United States Court of Appeals for the Fifth Circuit, in compliance with the Supreme Court Rules.

By.....

Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATE MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION AND BRIEF ON BEHALF OF NATHAN BAKER, ESQ., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

NATHAN BAKER, *Pro Se,*
1 Newark Street,
Hoboken, New Jersey, 07030.

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MOTION AND STATEMENT OF INTEREST OF NATHAN BAKER, ESQ., FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

To the Honorable Chief Justice and Associate Justices of The Supreme Court of The United States of America:

I, the undersigned, hereby request permission to file a brief *amicus curiae* in the above matter. I have been

heavily involved in the cases which have shaped much of the law which exists today. *The M/V "Tungus"* v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503 (1959); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki,* 358 U.S. 613, 79 S.Ct. 517 (1959). In addition I have handled, am handling, and will handle many cases which will be affected by the form taken by maritime law after this court's decision in this case. I believe that the brief arguments which I present based upon my research and analysis of the law and my experience in this field will assist the court.

For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae.*

NATHAN BAKER, ESQ.
1 Newark Street,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATE MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Questions Presented

Whether or not the duties imposed by maritime law for the protection of those who may be injured on navigable

waters should in all cases provide the basis for recovery even where maritime law "adopts" a state wrongful death act to determine who may take and what measure of damages is to be applied?

The maritime law defines the duties owed by shipowners and others and these duties should not be negated or modified by state wrongful death acts.

The decision of this court in *The Harrisburg,* 119 U.S. 119, 7 S.Ct. 140 (1886) held that there was no right in maritime law to recover damages for the death of a human being and that when admiralty "adopts" a state statute to provide for this right it takes also "the limitations" which are part of the statute. This court is well aware of the disparities which have followed from this decision. Presumably, the duties of a shipowner remain the same, regardless of whether the human being involved is merely maimed or is killed. However the remedy will depend, in the case of death, on where the accident occurred and vagarities of local laws. This does not help the image of the law as a rational and logical institution.

Maritime law is analagous to the common law. This court shapes and defines it in a similar fashion to the work done by state tribunals. *Cf. Kermarec* v. *Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406 (1959); *Cox* v. *Roth,* 348 U.S. 207, 75 S.Ct. 242 (1955). In the *Cox* case, *supra,* Mr. Justice Clark, at page 210 referred to a discussion of death statutes by Dean Roscoe Pound in 13 NACCA L.J. 188-189 (May 1954).

> "The *Cox* case, *supra,* while it involved the Jones Act, is significant because of the reference to the comment by Dean Pound on the case of *Graham* v. *Lusi,* 206 F.2d 223 (5 Cir. 1953). This case held

that the Florida Death by Wrongful Act Statute, as interpreted by the Florida Supreme Court, was not broad enough to cover an action based on unseaworthiness. Dean Pound apparently felt that it was time for the entire concept that wrongful death is non-remediable in a common-law or maritime action to be overhauled to meet current conditions. Among other things, Dean Pound stated at page 189:

> "* * * Lord Campbell's Act is now well over a century old and has been adopted in every common-law jurisdiction. To think of recovery for wrongful causing of death as something exceptional not to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law. * * *"

The court can meet the problem before it in a consistent, logical way which will not involve a violent departure from the existing law. The sequence of the argument is:

1. The duties for the safety of persons imposed by maritime law exist regardless of whehter the violation of such duty results in injury or death.
2. The maritime law has developed a full and consistent body of law defining duties and defenses to actions based on violations of such duties.
3. Only where there is a void, i.e., the absence of a well defined duty or defense in maritime law will the maritime law borrow or adopt another rule from another body of law.

4. In the case of wrongful death neither the common law nor the maritime law has a non-statutory rule defining who may take or the measure of damages flowing from death.

5. It is only on this element that a void exists.

6. Therefore, in enforcing a state wrongful death action, it will be only as to these elements, and only to the extent they are compatable with the affirmative rules of maritime law, that admiralty will "adopt" state statutes.

In the absence of a federal statute, this would promote consistency, recognize the uniformity of duties imposed under maritime law, and minimize the vagarities which presently result.

CONCLUSION

The best solution would involve a full maritime wrongful death law whether written by Congress, or fashioned by the court. Short of this, a refinement of the "adopting" doctrine of maritime law as discussed above will greatly improve the present state of the law.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that copies of this motion and brief have been furnished by mail to John W. Boult, Esquire, of Fowler, White, Collins, Gillen, Humkey & Treman, Post Office Box 1438, Tampa, Florida 33601, Attorneys for Appellee, States Marine Lines, Inc., and to David C.G. Kerr, Esquire, of Macfarlane, Ferguson, Allison, Kelly & Himes, Post Office Box 1531, Tampa, Florida, 33601, Attorneys for Appellee, Gulf Florida Terminal Company, and C.J. Hardee, Jr., Esquire of Hardee, Ott & Hamilton, 101 East Kennedy Boulevard, Tampa, Florida, 33602 Attorneys for Appellant.

Said service was made on December 30, 1969.

NATHAN BAKER

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 175

PETSONELLA MORAGNE, ETC., PETITIONER

v.

STATES MARINE LINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted by the Solicitor General pursuant to the Court's invitation of December 8, 1969.

OPINIONS BELOW

The opinion of the district court (App. 13) is unreported. The opinion of the court of appeals (App. 55) is reported at 409 F. 2d 32. The opinion of the Supreme Court of Florida on certification from the court of appeals (App. 27) is reported at 211 So. 2d 161.

JURISDICTION

The judgment of the court of appeals (App. 57) was entered in April 1, 1969. The petition for cer-

375-282—70——1

tiorari was filed on May 29, 1969, and was granted on November 10, 1969. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cause of action for wrongful death may be maintained under maritime law, independent of any statute expressly creating such a right.

STATEMENT

Petitioner, Petsonella Moragne, individually and as personal representative of the estate of Edward Moragne, Sr., brought this action in the Circuit Court for Hillsborough County, Florida, to recover for the wrongful death of Edward Moragne, Sr., a longshoreman in the employ of respondent Gulf Florida Terminal Company. The complaint alleged that on December 21, 1964, while Moragne was at work on the PALMETTO STATE, a vessel owned by respondent States Marine Lines Inc., a hatch beam in one of the vessel's cargo holds fell on him, causing his death on the same day (App. 2). The complaint went on to allege that the proximate cause of the death had been the negligence of States Marine's employees in failing properly to maintain the vessel or, in the alternative, the unseaworthiness of the vessel (App. 3–5).

States Marine removed the cause to the United States District Court of the Middle District of Florida pursuant to 28 U.S.C. 1332 and 1441, alleging that the parties were of diverse citizenship and that the amount in controversy exceeded $10,000 (App. 6–7).

Thereafter, it filed its answer, in which it admitted that Moragne had been a longshoreman lawfully aboard the vessel and that he had been killed by the falling hatch beam, but denied that the hatch beam had fallen as a result of negligence or unseaworthiness. (Multilith Record in the court of appeals at 36–40.)

States Marine also filed a third party complaint against Gulf Florida Terminal Company, Moragne's employer, alleging that, at the time of the accident, Gulf Florida was performing stevedoring services on the vessel under a contract which warranted that it would perform those services in a workmanlike manner. Further asserting that the vessel had been seaworthy when stevedoring operations had started and that Gulf Florida had been in complete control of the area of the vessel in which Moragne was working when the accident occurred, States Marine claimed indemnity on the ground that any negligence or unseaworthiness causing his death had resulted from Gulf Florida's stevedoring operations (App. 8-12).

Gulf Florida filed answers to both the complaint and the third-party complaint, generally asserting that it had not caused the accident (Multilith Record 44–48). It then moved to strike Count II of the plaintiff's complaint, which sought recovery based upon the asserted unseaworthiness of the vessel. The basis of the motion was that maritime law allows no recovery for wrongful death not on the high seas (*i.e.*, beyond the three-mile limit) and that the plaintiff's only possible basis for recovery was under the Florida wrong-

ful death statute (F.S.A. 768–01), which, it was argued, does not permit recovery for unseaworthiness (App. 12).

The district court granted the motion for the reasons asserted by Gulf Florida, and it dismissed with prejudice so much of petitioner's complaint as sought recovery based on the asserted unseaworthiness of the vessel. By leave of the court of appeals, an interlocutory appeal was then taken from this partial dismissal (App. 15).

In their briefs on appeal, the parties limited themselves to the question whether the Florida wrongful death statute permitted recovery for a death caused by the unseaworthiness of a vessel. At the suggestion of States Marine and Gulf Florida, the court of appeals, making use of the procedure provided by F.S.A. 25.031 and Rule 4.61, Florida Appellate Rules, certified that question to the Florida Supreme Court (App. 22–26).[1]

The Florida Supreme Court held that the Florida wrongful death statute did not permit the imposition of liability where the death was not the result of negligence, except in the limited area of the strict liability of a manufacturer for injuries caused by his products (App. 27–41). Thus, that court held (with one justice dissenting) that liability for unseaworthi-

[1] The question was framed in the following terms (App. 26):

> Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the Maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?

ness, which it characterized as a type of liability without fault, was not encompassed by the Florida statute, and it answered in the negative the question certified to it.

The Fifth Circuit then affirmed the judgment of the district court, following this Court's decision in *The Tungus* v. *Skovgaard,* 358 U.S. 588, to the effect that the remedy of a longshoreman for wrongful death within the territorial waters of a State is delimited by that State's law (App. 55–56).

ARGUMENT

INTRODUCTION AND SUMMARY

At the time of his death, Moragne was working as a longshoreman on board the PALMETTO STATE, which was anchored in the territorial waters of Florida. Moragne was performing work traditionally performed by seamen and therefore was owed the duty of seaworthiness. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85. As this Court noted in *Sieracki,* the vessel owner's obligations to supply a seaworthy ship is "a form of absolute duty owing to all within the range of its humanitarian policy" (328 U.S. at 95). See *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96. The complaint in the present case alleges that the fall of the hatch beam that killed Moragne was the result of a defect in the locking mechanism which held the beam in place (App. 4–5). If the allegations are true (as must be assumed for present purposes), there can be little doubt that the PALMETTO STATE was unseaworthy, and its unseaworthiness was the cause of the

fatal injury. Cf. *Crumady* v. *The J. H. Fisser*, 358 U.S. 423.

The court of appeals held, however, that the alleged breach of the duty to provide a seaworthy vessel could not be invoked in this case to establish the liability of States Marine for damages to Moragne's survivors because that ground of recovery is not encompassed by the wrongful death act of Florida—a statute enacted without concern for the special policies of the seaworthiness doctrine, and, indeed, a statute to which the concept of unseaworthiness is "completely foreign" (Pet. App. 12).

The decision of the court of appeals presumably is compelled by this Court's decision in *The Tungus* v. *Skovgaard*, 358 U.S. 588, which was occasioned by the rule announced in *The Harrisburg*, 119 U.S. 199, that maritime law does not permit an action for wrongful death in the absence of a statute creating such a right. In an action for maritime wrongful death on the navigable territorial waters of a State, this Court has held, the only applicable remedy is that provided by the wrongful death statute of the State upon whose waters the death occurred. *The Harrisburg, supra; The Tungus* v. *Skovgaard, supra; Western Fuel Co.* v. *Garcia*, 257 U.S. 233.

Thus, although Moragne could have recovered damages for the breach of the acknowledged maritime duty to provide a seaworthy vessel had he survived, the fact that his injury was serious enough to result in his death is, by virtue of this rule, a bar to any recovery for the breach. Our submission is that this result is no longer, if it ever was, required, and that it

would be appropriate for this Court to overrule *The Harrisburg* if it believes that the time has come for this step in the development of the maritime law.

THE RULE IN *The Harrisburg*, 119 U.S. 199, THAT THERE IS NO CAUSE OF ACTION FOR WRONGFUL DEATH UNDER THE GENERAL MARITIME LAW IS OUTMODED AND SHOULD NOW BE REPLACED BY A MORE MODERN RESOLUTION OF THIS PROBLEM

1. *The Harrisburg*, 119 U.S. 199, is the source of the rule that no action for wrongful death can be maintained under American maritime law without a statute creating such a right. That case was an action *in rem* by the widow and child of an officer of a vessel who was fatally injured when the vessel collided with THE HARRISBURG in the territorial waters of Massachusetts. The home port of THE HARRISBURG was Philadelphia and the action was brought in the District Court for the Eastern District of Pennsylvania. The district court found that the collision had been caused by the negligent navigation of THE HARRISBURG, and awarded $5100 to the libellants. The circuit court affirmed, although it noted some doubt as to the soundness of its holding. 15 Fed. 610, 614. Conclusions of law were entered that "[i]n the admiralty courts of the United States, the death of a human being upon the high seas, or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law" (15 Fed. 610, 614). It was noted that, although the action could not have been maintained in the state courts under the wrongful death acts of either Pennsylvania or Massachusetts

because their one-year periods of limitation had expired, that fact did not bar recovery in a suit arising within the federal admiralty jurisdiction (*id.* at 614–615).

On appeal, this Court reversed. In an exhaustive review of the prior decisions, the Court agreed with the lower courts that there was substantial authority in Federal cases that the general maritime law did afford a remedy for wrongful death in the absence of a statute—although the common-law rule was to the contrary. In *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C.C.D. Md.), for example, Chief Justice Chase, sitting on circuit, had questioned why recovery was not possible if death resulted from negligent injury, while recovery was allowed if the victim lived. "It is difficult to answer this question," he continued, "and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules" (21 Fed. Cas. at 910). On this basis, he granted a recovery for wrongful death under the general maritime law. The same result had been reached, upon similar reasoning, in other cases cited in *The Harrisburg*: *Plummer* v. *Webb*, 19 Fed. Cas. 894 (No. 11,234) (D. Maine); *The Towanda*, 24 Fed. Cas. 74 (No. 14,109) (C.C. E.D. Pa.); *The Charles Morgan*, 5 Fed. Cas. 511 (No. 2,618) (S.D. Ohio); *Holliday* v. *The David Reeves*, 12 Fed. Cas. 386 (No. 6,625) (D. Md.); *The Garland*, 5 Fed. 924 (E.D. Mich.); *Holmes* v. *O. & C. Ry. Co.*, 5 Fed. 75 (D. Ore.); *The E. B. Ward*, 17 Fed. 456 (C.C. E.D. La.); *The Manhasset*,

18 Fed. 918 (E.D. Va.); *The Columbia*, 27 Fed. 704 (S.D. N.Y.).

The Court noted that the basis for these holdings was the belief that "the [rule at] common law is not founded on good reason, and is contrary to natural equity and the general principles of law" (119 U.S. at 213). Yet, without detracting from the force of this argument, the Court concluded that it was unable to escape the implications of its earlier holding in *Insurance Company* v. *Brame*, 95 U.S. 754, that such an action could not exist at common law without a statute (119 U.S. at 213, emphasis added):

> Since, however, it is now established [*i.e.*, by *Insurance Co.* v. *Brame, supra*] that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, *we are forced to the conclusion* that no such action will lie in the courts of the United States under the general maritime law. * * *

The Court thus rested its holding in *The Harrisburg* squarely upon the common-law rule.

2. The reasons underlying the rule at common law that an injury causing death could not be the subject of a civil action are somewhat obscure, but it seems clear that no consideration currently exists for holding that a violation of a duty that causes death is not

actionable, while violation of such a duty causing an injury short of death is actionable.

The first clear statement of the rule as it is presently known was made by Lord Ellenborough, sitting at *nisi prius*, in *Baker* v. *Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). There, in an action by a husband against a stage-coach company for the death of his wife when the coach in which they rode overturned, Lord Ellenborough held, without citation of authority or supporting reasoning, "[i]n a civil Court, the death of a human being could not be complained of as an injury * * *."

Later historical study of this decision led to the conclusion that the only ground upon which it might be supported was the early common-law doctrine of merger of the civil wrong in a felony. See Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916); Pollock, *The Law of Torts*, 63 (12th ed. 1923). According to this doctrine, where a wrongful act constituted both a tort and a felony, the tort was regarded as being less important than the offense against the Crown, and the civil wrong was merged into, or pre-empted by, the felony; it could not then be the subject of a civil action. *Higgins* v. *Butcher*, Yelv. 89, 80 Eng. Rep. 61 (K. B. 1607); *Smith* v. *Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (K. B. 1677). There was some question whether the felony merger rule extinguished the civil wrong or merely delayed it, but that problem was largely irrelevant because punishment for felony was the death of the felon and the forfeiture of his chattels and escheat of

his real property to the Crown. Thus, after the criminal punishment had been exacted nothing remained of the felon or his property on which to base a civil action. See Holdsworth, *supra,* at 433–434.[2]

In 1916, the House of Lords held that the felony merger rule was the proper historical basis for the holding in *Baker* v. *Bolton,* and held further that even though the felony merger rule was no longer a part of the law, there could still be no action for wrongful death absent a statute. *Admiralty Commissioners* v. *S.S. Amerika,* [1917] A.C. 38. The rationale of the Lords' decision appears to be that, since there once was a justification (*i.e.,* the felony merger doctrine) for the prohibition of nonstatutory death actions, that prohibition should continue even though the justification was gone. See Pollock, *supra,* 63; 3 Holdsworth, *History of English Law,* 676–677 (3d ed. 1923). Lord Parker's opinion stated that while the result reached is "anomalous * * * to the scientific jurist" it is based on "historical grounds" and should not be disturbed (*Admiralty Commissioners, supra,* at 50). He also suggested (*id.* at 42–43) that there was force to Baron Bramwell's dissent in *Osborn* v. *Gillett,*

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[2] The cases recognizing the felony merger doctrine were all decided in the seventeenth century, with no further mention of the problem in a wrongful death case until *Baker* v. *Bolton.* Holdsworth suggests that the reason why this state of the law was tolerated for such a long period may in part have been that the relatives of people killed by wrongful acts might have obtained a sum of money from the wrongdoer by threatening to bring a criminal appeal (*i.e.,* a criminal action instituted by a private person). Holdsworth, *supra,* at 435.

8 L.R. Exch. 88, 94 (1873), where Bramwell had forcefully argued that a cause of action for wrongful death should be allowed, and had cast doubt upon the accuracy of the report of *Baker* v. *Bolton*.

It is noteworthy that, 20 years later, the House of Lords criticized its decision in *Admiralty Commissioners* and limited it to its facts. *Rose* v. *Ford*, [1937] A.C. 826. Lord Atkin stated that the reasoning of the earlier decision "may seem unsatisfactory" and that the result was "illogical" (*id.* at 833, 834).

3. In addition to the admiralty cases discussed above, pp. 8-9, *supra*, some early non-maritime American cases refused to follow the English rule announced in *Baker* v. *Bolton*. See, *e.g.*, *Sullivan* v. *Union Pac. R. Co.*, 23 Fed. Cas. 368, 371 (No. 13,599) (C.C.D. Neb. 1874) (where the court said that the rule was "incapable of vindication" and "[not] deeply rooted in the common law"); *Shields* v. *Yonge*, 15 Ga. 349 (1854); see also *Cross* v. *Guthery*, 2 Root 90, 92 (Conn. 1794). Nevertheless, the generally accepted rule in the United States in non-admiralty cases conformed to the English rule. In *Insurance Company* v. *Brame*, 95 U.S. 754, after a review of the American decisions, this Court concluded that a wrongful death, in the absence of a statute, was not actionable under the "general" Federal common law, and, as shown above, it was that case which served as the primary authority for the Court's later holding in *The Harrisburg*. See 119 U.S. at 204, 208.

The felony merger doctrine, however, was not avail-

able to American courts to support these holdings. That doctrine had no place in American law except, in limited instances, to delay a civil action until after the criminal trial. But because in this country (unlike England), there were no forfeiture-of-property provisions as punishment for felony, that narrow exception could not serve as a substantial reason for precluding wrongful death actions. *E.g.*, *Hyatt* v. *Adams*, 16 Mich. 180, 185–188 (1867); *Grosso* v. *Delaware, Lackawanna & Western R. Co.*, 50 N.J.L. 317, 319–320 (1888); see Prosser, *Torts* 8 (3d ed. 1964).

Some courts found justification for their holdings in an asserted difficulty in computation of damages for a wrongful death. *E.g.*, *Van Amburg* v. *Vicksburg R. Co.*, 37 La. Ann. 650, 651 (1885); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 18 (N.Y. 1858); *Connecticut Mutual Life Insurance Co* v. *New York & New Haven R. Co.*, 25 Conn. 265, 272–273 (1856). But such a calculation was made without difficulty in *Hollyday* v. *The David Reeves*, 12 Fed. Cas. 386, 388 (No. 6,625) (D. Md.), and the computation of the loss sustained by dependents as the result of a wrongful death is, of course, generally required in the administration of wrongful death statutes. See Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 402 at 405, n. 17.

Other courts appear to have improperly applied the maxim *actio personalis moritur cum persona*. *E.g.*, *Eden* v. *Lexington & Frankfort R. Co.*, 53 Ky. 204, 206 (1853); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 17 (N.Y. 1858). This axiom, whatever its current validity (cf. *Cox* v. *Roth*, 348 U.S. 207, 209–210),

deals only with the issue whether the victim's personal action (*e.g.*, for pain and suffering) survives his death, and has no relevance with respect to the distinct question whether a dependent may maintain an action for the loss to him caused by the death. See Winfield, *Death As Affecting Liability in Tort*, 29 Colum. L. Rev. 239, 241–250, 253 (1929).[3]

Finally, some courts offered no other justification than that the rule had been established by prior decisions and was not to be disturbed. *Grosso* v. *Delaware, Lackawanna & Western R. Co.*, 50 N.J.L. 317, 321 (1888); *Green* v. *Hudson River R. Co.*, 28 Barb. 9, 17 (N.Y. 1858). Indeed, this appears to have been the approach used by this Court in *Insurance Co.* v. *Brame, supra,* in which no reason was stated in support of the general rule other than that it was established at common law.[4]

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[3] Holdsworth suggests that Lord Ellenborough's decision in *Baker* v. *Bolton* itself may have been influenced by an erroneous application of the maxim. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431, 435 (1916).

[4] *Brame* was a suit by an insurance company against the alleged murderer of its insured for payment of the amount of a life insurance policy that it had had to pay by reason of the insured's death. The Court expressed the view that this injury to the insurance company was too remote to be protected by tort law, 95 U.S. at 758–759. This ground itself was sufficient to support the Court's ruling against the insurance company, and the Court's additional statement that in no case can wrongful death give rise to a tort action independent of a statute was actually not necessary to the result. Similar alternative reasoning was set forth by Lord Sumner in *Admiralty Commissioners* v. *S. S. Amerika*, *supra*, [1917] A.C. at 59–60, and upon this ground the holding was limited in *Rose* v. *Ford*, *supra*, [1937] A.C. at 850.

4. That no public policy presently exists for denying a remedy for wrongful death is illustrated by the universal disapproval by legislatures of the common-law rule preventing recovery for wrongful death. The first of these statutes was Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846). Today, every State in this country has enacted a wrongful death statute. See the tabulation and comparison of these statutes in Smith, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 402. The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides that, in certain circumstances, the United States may be held liable for negligently caused wrongful death to the same extent as a private person. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1. And Congress has also created an action for wrongful death in the Federal Employers' Liability Act, 45 U.S.C. 51, 59; the Jones Act, 46 U.S.C. 688, and the Death on the High Seas Act, 46 U.S.C. 761, 762.

The effect of these statutes, as a whole, has been to abolish whatever justification there once was for the flat refusal by courts to allow actions for wrongful death. See Landis, *Statutes and the Sources of Law*, Harvard Legal Essays in honor of Joseph Henry Beale and Samuel Williston, 213, esp. at 226–227 (1934). Mr. Justice Holmes (speaking for himself, Chief Justice Taft, and Justices Brandeis and McKenna) said:

> [I]t seems to me that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering

> only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope. [Citation omitted.] Without going into the reasons for the notion that an action (other than [a criminal] appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it ever was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of the United States and of most if not all of the States. * * *

Panama R. Co. v. *Rock,* 266 U.S. 209, 216 (dissenting opinion). Finally, in commenting adversely upon the decision in *Graham* v. *A. Lusi, Ltd.,* 206 F. 2d 223 (C.A. 5), a case practically indistinguishable from the present,[5] Dean Pound said:

> [The decision] proceeds on a mode of thinking about legislation that is wholly out of date. Lord Campbell's Act is now well over a century old and has been adopted in every common-law jurisdiction. To think of recovery for wrongful death as something exceptional not

[5] *Graham* was a libel for wrongful death filed in admiralty by the wife of a seaman killed when a defective chain parted and a cargo boom fell and struck him. The court of appeals held (citing *The Harrisburg*) that there was no cause of action for wrongful death due to unseaworthiness in the absense of a statute, that the law of Florida, which gave no remedy for unseaworthiness, must apply and that recovery had been properly denied in the absence of a finding of negligence.

> to be treated as part of the general law but to be provided for specifically as to application to every item of recent legislative improvement of the law is an anachronism. Today we should be thinking of the death statutes as part of the general law. * * *

Pound, Comment on *State death statutes—Application to death in admiralty,* 13 NACCA L.J. 188, 189 (1954).

5. Apart from the general question whether an action for maritime wrongful death can be maintained independently of a statute creating such a right, there is the specific question whether in situations like the present (*i.e.*, where a longshoreman acting as a seaman dies because of an injury received while upon the territorial waters of a State), Congress has affirmatively indicated an intention to exclude a wrongful death action based upon breach of the obligation to supply a seaworthy ship, and instead to relegate suitors exclusively to whatever remedy is available under State law. We think that no such Congressional determination appears.

In 1920, Congress passed the Death on the High Seas Act, 46 U.S.C. 761 *et seq.* Section 1 of that statute (46 U.S.C. 761) provides in pertinent part:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State * * * the personal representative of the decedent may maintain a suit for damages * * * in admiralty for the exclusive benefit or the decedent's wife, husband, parent, child, or dependent relative

> against the vessel, person, or corporation which would have been liable if death had not ensued.

The Act thus creates a right of action for wrongful death only upon the high seas, beyond the territorial waters of the states.

In Section 7 of the Act (46 U.S.C. 767) Congress further provided that

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this [Act]. Nor shall this [Act] apply to the Great Lakes or to any waters within the territorial limits of any State * * *.

As this Court has held, this Section manifests a legislative purpose that State laws governing wrongful death should continue to be available, according to their terms, where no remedy is provided by the Death on the High Seas Act. *The Tungus* v. *Skovgaard*, 358 U.S. 588, 593. But neither the language of the Act, nor its legislative history, gives any indication that this preservation of State law was intended by Congress to preclude the federal courts from vindicating the peculiarly federal, maritime interest at issue in this case—namely, the right of a person acting as a seaman to be supplied a seaworthy vessel on which to work. It ought not to be supposed, without unequivocally expressed Congressional intent, certainly absent here, that Congress, in passing the Death on the High Seas Act, intended to cede exclusively to

the States the task of protecting such important maritime interests.

That no such a result was contemplated by Congress is underlined by the fact that in 1920, when the Death on the High Seas Act was passed, "the seaman's right to recover damages for injuries caused by the unseaworthiness of the ship was an obscure and relatively little used remedy." Gilmore & Black, *The Law of Admiralty* 315 (1957). Moreover, it appears that at least prior to this Court's decision in *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255 (1922), and perhaps until its decision in *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96 (1944), the determination whether a vessel owner had failed to meet the duty to supply a seaworthy vessel depended upon his exercise of due diligence—the most common negligence standard governing liability in personal injury actions. Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 Corn. L.Q. 381, 392–393, 396 (1954); see, *e.g., Storgard* v. *France & Canada S.S. Co.,* 263 Fed. 545, 547 (C.A. 2, 1920); *The Henry B. Fiske,* 141 Fed. 188, 190 (D. Mass., 1905). It remained for the *Sandinger* and *Mahnich* cases to formulate the more demanding standard of strict liability for unseaworthiness which prevails today. Thus Congress in 1920 may well have contemplated that the standard of behavior that the states would generally apply in determining liability—*i.e.,* the exercise of due care—was the same as that im-

posed by federal maritime law in nonfatal accidents. There is no indication that Congress intended the anomaly created by the decision below—that breach of the obligation to provide a seaworthy vessel is actionable if a nonfatal injury results, but may be *damnum absque injuria* if the injury is so serious as to cause death.*

6. Finally, the overruling of *The Harrisburg* would help correct an undesirable lack of uniformity in maritime actions and would relieve State courts (or federal courts applying State law) and State legislatures of the obligation, created by *The Harrisburg* and *The Tungus*, of accommodating State law to exclusively maritime policies and considerations—matters with which the States rarely are involved.

The recognition of a right to recover under the general maritime law for death caused by the breach of the obligation to supply a seaworthy vessel would assure that the substantive standard governing conduct and duty of vessel owners would be the same throughout all the navigable waters of the United States, a result entirely in harmony with the

* It is noteworthy that no issue of this sort was presented in *The Harrisburg*. There, the problem was that the one-year statutes of limitations of the wrongful death acts of Massachusetts and Pennsylvania had expired before the action was started. No question concerning the standards of behavior comprehended by those statutes, or by the maritime law, appears to have been presented. Thus, for all that appears in the opinion, there was no plainly discernable federal maritime policy that could not have been vindicated by State law had the action been brought before the expiration of one year. Cf. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221.

Constitutional concept of the federal admiralty jurisdiction as

> a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention [of the framers of the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 21 Wall. 558, 575.[7] And, as might be expected, experience with the application of *The Tungus* has shown that State law does not provide ready guidance as to standards in maritime cases. Courts have encountered considerable difficulty in determining from the terms and purpose of State wrongful death acts whether the State law encompasses a cause of action for breach of the obligation to supply a seaworthy vessel. See, *e.g., Grigsby* v. *Coastal Maine Service,* 412 F. 2d 1011, 1023–1029 (C.A. 5, Louisiana law); *Union Carbide Corp.* v. *Goett,* 278 F. 2d 319, 321 (C.A. 4, on remand from

[7] Presumably, the existence of a uniform non-statutory action for wrongful death in admiralty would not be limited to seaworthiness cases, and would permit the application of a single standard of conduct to govern both fatal and non-fatal injuries in all personal injury actions. Thus other equally anomalous situations in which a differing standard of liability has been required by application of State law in cases involving death would be rectified. *E.g., Hess* v. *United States,* 361 U.S. 314.

361 U.S. 340, West Virginia law).[8] Their difficulty itself suggests the inappropriateness of continued adherence to the rule of *The Harrisburg*.

CONCLUSION

Ordinarily, changes in the law come through legislative action. But the courts have a role, too, in the development of the law, and this is particularly true in the case of the maritime law, which, historically, is so much the product of judicial decision. Such judicial action is especially appropriate to fill in the gaps in the interstices, and to bring uniformity, where the path has long since been clearly marked out by legislative action establishing the basic policy. We suggest this is such an occasion.

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[8] In both of these cases, the State wrongful death act did not expressly encompass deaths resulting from breaches of the duty to provide a seaworthy vessel. The courts concluded that the statutes nevertheless comprehended actions for breach of this duty by relying on the breadth of the statutory terms and the finding that the legislatures intended by such language to reach all wrongs, including those not specifically adverted to. By contrast, the Florida Supreme Court in the present case, interpreting a statute of similarly broad terms, held that the Florida legislature could not have intended to cover the "completely foreign" maritime concept of unseaworthiness. (App. 37).

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1970.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 175

PETSONELLA MORACCHINI, as personal representative of the Estate of EDWARD [illegible], Jr., deceased, and PETSONELLA MORACCHINI, individually,

Petitioners,

vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Impleaded.

On Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF ON BEHALF OF
GULF FLORIDA TERMINAL COMPANY, RESPONDENT

[illegible]

[illegible]

[illegible]

[illegible]

Counsel for Respondent
Gulf Florida Terminal Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF ON BEHALF OF GULF FLORIDA TERMINAL COMPANY, RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is officially reported at 409 F.2d 32. The opinion of the Supreme Court of Florida is officially reported at 211 So.2d 161. The opinion of the District Court, Middle District of Florida, Tampa Division, is unreported and appears in the Appendix at Page 13.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is predicated upon 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions which Petitioner asserts are involved in this appeal are set forth in Petitioner's brief at pages 4 and 5.

QUESTION PRESENTED FOR REVIEW

Whether there exists a right of action for wrongful death in admiralty law independent of a statute specifically furnishing such a right and remedy.

STATEMENT OF THE CASE

The factual background together with the significant developments of this case in the lower courts is adequately stated in Petitioner's brief at pages 6 through 9.

ARGUMENT

I

QUESTIONS RAISED BY PETITTIONER WERE NOT PRESERVED BELOW

Respondents Gulf Florida Terminal Company and States Marine Lines, Inc. heretofore filed a joint brief in opposition to the Petition for a Writ of Certiorari filed by Petitioner in this case. Respondent States Marine Lines, Inc., in Point I of its separate brief filed in

this cause has reiterated in detail the arguments and authorities set forth in the joint brief of Respondents upon the issue that the orderly administration of cases on appeal preclude the assertion of grounds and issues not raised and preserved in the lower courts; this principle is of especial import where, as here, Petitioner affirmatively sought construction of the Florida wrongful death statute by the Supreme Court of Florida.

Respondent Gulf Florida Terminal Company, rather than repeat in detail what has heretofore been ably presented by Respondent States Marine Lines, Inc., joins in and incorporates the argument of States Marine Lines, Inc. hereunder.

II

THE HARRISBURG AND THE TUNGUS SHOULD NOT BE REVERSED; CREATION OF CAUSE OF ACTION FOR WRONGFUL DEATH IS A LEGISLATIVE FUNCTION

That a right of action and remedy for wrongful death is a function of the Legislature has been fully discussed and documented under Point III of the brief on behalf of Respondent States Marine Lines, Inc. Of especial significance is the multitude of problems facing a Legislature in devising a right of action and remedy for wrongful death; again, all of these problems have been fully discussed and presented in the aforementioned brief filed by Respondent States Marine Lines, Inc.

Although the briefs *amicus curiae* filed in this cause assume that this Court can, by overruling *The Harrisburg* (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, and *M/V Tungus v. Skovgaard* (1959), 358 U.S.

588, 79 S.Ct. 503, 3 L.Ed 2d 524, develop judicially a right and remedy for wrongful death, it is significant to note that Petitioner is reluctant to go so far. At page 36 of Petitioner's brief, under the heading "Practical Considerations" Petitioner says that in the event the Court should overrule *The Harrisburg,* that:

> "* * * the Court should lay down some general guide lines as to future practice in matters concerning survival and wrongful death."

It is clear that Petitioner is well aware of the numerous problems involved in the *judicial development* of a cause of action and remedy for wrongful death which have been called to the attention of the Court.

The brief of Petitioner, together with the briefs *amicus curiae,* have not considered the significance and impact of a Bill presently pending in the United States Senate.[1] The bill in question seeks to amend the Death on the High Seas Act, 46 U.S.C. 761, in various respects. Of critical import is the provision which would extend coverage of the Act to the navigable waters of the respective states; that is, the marine league limitation presently appearing in the Act would be removed. In essence, the present Bill would cover the issues now pending in this Court; the Bill would provide a federal right of action and remedy for wrongful death in favor of beneficiaries, named in the Bill, of persons killed upon the "navigable waters of the United States, the District of Columbia, Puerto Rico, or the territories or

[1] Bill No. S. 3143, entitled "A Bill to Amend the Act Known as the Death on the High Seas Act". The Bill was introduced by Senator Magnuson; it is dated November 14, 1969 and has been referred to the Committee on Commerce. The text of the Bill is set forth in Appendix A to this brief.

dependencies of the United States, or beyond such navigable waters occurring on the high seas, including acts or occurrences on fixed structures therein." The impact of this Bill upon the instant case is manifest; the Court is being asked to judicially legislate upon a matter which is presently being considered by the Congress.

In view of the multiple problems inherent in a judicially created right of action for wrongful death, and in view of the Bill presently pending in the United States Senate concerning the identical matters presented in this appeal, it is submitted that this Court should decline to overrule or to retreat from *The Harrisburg* or *The Tungus*. If change in the law is necessary it should come from Congressional action now pending and under consideration.

III

APPLICATION OF THE FLORIDA WRONGFUL DEATH ACT DOES NOT VIOLATE THE CONCEPT OF UNIFORM APPLICATION OF FEDERAL LAW IN MARITIME MATTERS

A. *Reversal of The Harrisburg and The Tungus Cannot be Justified Under the Guise of Uniformity*

Petitioner seeks reversal of the opinion below upon the theory that application of the Florida Wrongful Death Act, Section 768.01, Florida Statutes, does violence to the concept of uniformity in maritime law. Petitioner contends that the holding in this cause is in conflict with decisions of other circuits in cases construing the wrongful death acts of states *other than* Florida. Petitioner is content with those decisions applying particular state wrongful death acts when such acts have been construed by state or federal courts to

include a cause of action for unseaworthiness. However, Petitioner strenuously objects to the ruling below which applied the wrongful death statute of Florida in accordance with the construction of that statute by the Supreme Court of Florida. Petitioner says that the result below cannot be maintained in that it destroys the uniformity of admiralty law and allows the State of Florida to inject its substantive law into a cause in admiralty. It is clear that Petitioner's argument is inconsistent; there is a uniformity of application irrespective of whether a particular state statute does or does not include a cause of action for unseaworthiness. Furthermore, the instant case does not fall within that doctrine of uniformity discussed in *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654, and subsequently in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086.

The Harrisburg (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, teaches that in admiralty there is no right or cause of action for wrongful death.[2] Subsequent to *The Harrisburg*, federal courts have been even handed in the application of this rule. Actions for wrongful death are maintainable in admiralty where there is a statute giving such a right and providing a remedy therefor. *M/V Tungus v. Skovgaard* (1959), 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed 2d 524, was a reaffirmation of the principle enunciated in *The Harrisburg*, and it likewise has been even handedly applied. Neither *The Harrisburg* nor

[2] A review of *The Harrisburg* shows that the Court carefully reviewed existing precedents, both for and against the proposition that admiralty law recognizes a cause of action for wrongful death, and then held that the general admiralty law of maritime nations did not recognize such a cause of action absent a statute so providing. Contrary to Petitioner's suggestion, *The Harrisburg* was not an irrational departure from established jurisprudence.

The Tungus has engendered confusion or disunity in application. When suit is brought for the wrongful death death of a maritime worker killed within the admiralty jurisdiction, the federal courts give relief pursuant to the wrongful death statute of the state wherein the death occurred. Although it is recognized that the present rule of law leads to different results dependent upon which state statute is being applied, this does not give rise to that type of non-uniformity which the admiralty abhors. The early cases, premised upon the constitutional grant of admiralty jurisdiction to the federal courts, established the principle that general maritime law was uniformly applicable within the admiralty courts. *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654. In *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086, the Court struck down an attempt by Congress to incorporate into the general admiralty law the respective workmen's compensation statutes of the various states. The basis of the ruling in *Jensen* was that the Congressional attempt to saddle ship owners with the burdens of state compensation acts was destructive of uniformity in the administration of maritime law. The application of the doctrine of uniformity in *Jensen* can be sustained. What Congress sought to do was to require ship owners to comply with a variety of workmen's compensation statutes which were then in effect in the several states. It is clear that such an attempt would have burdened the ship owners operations between the states and foreign nations. The *Jensen* opinion itself outlines some of the burdens placed upon the ship owners by the New York statute in question in that case (244 U.S. 205, 214).

A clear distinction exists between *Jensen* and the present rule of law in the area of wrongful death actions. What Petitioner's argument overlooks is that her right to a remedy under the Florida Wrongful Death Act, an act which creates in her a *new cause of action, Morange v. States Marine Lines, Inc.*, (Fla. 1968) 211 So.2d 161, in no way hinders the maritime operations of shipowners. Petitioner's remedy and the substantive law applicable thereto, is of local concern; it has no interstate or international implications.

Petitioner further argues that under the present rule of law Florida is free to legislate the rights and duties owed to maritime workers. There is no support for such argument. The Florida Legislature and the Florida Courts have a legitimate interest in providing a remedy for the wrongful death of Florida citizens. The Florida Wrongful Death Act creates *in Petitioner* a cause of action. Petitioner's cause of action is separate and apart from that of her deceased husband; her husband's right to a maritime remedy expired at his death.[3]

The instant case does not fall within the doctrine of uniformity established by this Court in *Jensen* and subsequent cases, and the concept of uniformity in admiralty law cannot furnish a legitimate basis for reversing the opinion of the Court of Appeals below, nor can it support reversal of *The Harrisburg* or *The Tungus*.

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[3] Congress, in passing the Jones Act, 46 USC 688, did not provide the beneficiaries of a deceased seaman with a cause of action for unseaworthiness. Further, had Petitioner's decedent been a seaman who was killed within the navigable waters of the State of Florida, she would have no cause of action for unseaworthiness even assuming the Florida Wrongful Death Act incorporated such an action. *Gillespie v. U.S. Steel Corporation* (1964), 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed. 2d 199.

B. *Principles Established by The Harrisburg and The Tungus Have Been Applied and Followed by Many Courts.*

Even prior to *The Harrisburg* (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, it was recognized that there was no cause of action or remedy in admiralty for death ensuing from a maritime tort. In *Sherlock v. Alling* (1876), 93 U.S. 99, 23 L.Ed 819, the wrongful death statute of Indiana was used to provide a right and remedy for a death arising from a collision upon the Ohio River. The contention raised by Petitioner today that the use of state wrongful death statutes in admiralty does violence to the concept of uniformity was put to rest in *Sherlock v. Alling* where the Court held that application of state death statutes was not an infringement of the constitutional powers of Congress to legislate in the admiralty field. Similarly, in *Western Fuel Company v. Garcia* (1921), 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed 210, it was held that the one year statute of limitation applicable to the state wrongful death act was enforceable in admiralty. In reaching its decision the Court noted that the application of state wrongful death statutes in admiralty did not create non-uniformity:

> "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." 257 U.S. 233, 242.

Across the years there have been innumerable applications of state wrongful death statutes in the federal courts. For a sampling of these decisions see the cases collected in the Annotation: Death — State's Territorial Waters, 71 A.L.R. 2d 1296.

It is submitted that the long line of precedent for the uniform application of the principles enunciated in *The Harrisburg* and *The Tungus* preclude reversal or reatreat from those cases under the guise of uniformity.

C. *Is the Concept of Uniformity in Admiralty Jurisdiction Still Viable?*

Petitioner's brief gives the impression that the doctrine of uniformity is all pervading and will not countenance application of any substantive or statutory law other than that declared by Congress or the Federal Courts. Research indicates the contrary; that in fact there is little left of the doctrine of uniformity.

The difficulties inherent in a broad brush application of principles laid down in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086, have been frequently recognized by the Courts; the consequence of this recognition has been a process of narrowing of the concept of uniformity with the concomitant expansion of the applicability of state law in cases of maritime concern but of predominately local nature. *Davis v. Department of Labor & Industries* (1942), 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed 246. The rationale of *Jensen* has been specifically restricted to state workmen's compensation statutes. *Standard Dredging Corporation v. Murphy* (1943), 319 U.S. 306, 63 S.Ct. 1067, 87 L.Ed 1416.

Outside the ambit of workmen's compensation statutes there are numerous examples of application of state law in admiralty matters. See for example: *Wilburn Boat Co. v. Fireman's Fund Insurance Company* (1955), 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed 337; *Huron Portland Cement v. Detroit* (1960), 362 U.S. 440, 80

S.Ct. 813, 4 L.Ed 2d 852; *Just v. Chambers* (1941), 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed 903. In *Just v. Chambers* the Court pointed out that:

> "Uniformity is required only when the *essential features* of an exclusive federal jurisdiction are involved." 312 U.S. 383, 392. (Emphasis added.)

From the opinion in *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654, it is clear that the "essential features of an exclusive federal jurisdiction" concern:

> "* * * subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." 88 U.S. 558, 22 L.Ed 654, 662.

It is submitted that Petitioner's case, being of a local nature, does not bring into play the doctrine of uniformity of federal law in maritime matters.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Brief of Respondent, Gulf Florida Terminal Company, have been furnished by U.S. Mail, postage prepaid, to:

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Service of the foregoing copies effected this 6TH day of February, 1970.

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APPENDIX A

91ST CONGRESS

1ST SESSION

S. 3143

IN THE SENATE OF THE UNITED STATES

NOVEMBER 14, 1969

Mr. MAGNUSON (by request) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend the Act known as the Death on the High Seas Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act relating to the maintenance of actions for death on the high seas and other navigable waters", approved March 30, 1920 (41 Stat. 537; 46 U.S.C. 761 et seq.), is amended—

(1) by striking out the first section and inserting in lieu thereof the following: "That (a) this Act may be cited as the 'Maritime Death Act of 1969'.

"(b) Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring upon the navigable waters of the United States, the District of Columbia, Puerto Rico, or the territories or dependencies of the United States, or beyond such navigable waters occurring on the high seas, including acts or occurrences on fixed structures therein, the personal representatives of the decedent or the legal representatives of his estate may maintain a suit for damages in

the district courts of the United States or in any other court of competent jurisdiction, with a right of jury trial of all issues of fact for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, corporation, or other entity which would have been liable if death had not ensued.";

(2) in section 3 by striking out "two" wherever appearing and inserting in lieu thereof "three";

(3) in section 5 by striking out "of admiralty of the United States" and inserting in lieu thereof "of the United States or in any other court";

(4) in section 7 by striking out the second sentence; and

(5) by striking out section 8 and inserting in lieu thereof the following new sections:

"SEC. 8. Any action heretofore brought within two years of death shall not abate and if any action has been held time barred and dismissed, said action shall be reinstated pursuant to this Act upon application to the proper court.

"SEC. 9. If a person dies and at the time of his death has a cause of action under maritime law for any injury to his person or property as a result of the wrongful act, neglect, or default of another, the personal representatives of the decedent or the legal representatives of the decedent or the legal representatives of his estate may maintain the cause of action to recover damages for the benefit of the estate of the deceased against the alleged wrongdoer, his estate, or his legal representatives."

SEC. 2. The amendments made by this Act shall become effective after thirty days following the date of enactment of this Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONER

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

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Richard H. McInnis, On Brief

SUMMARY OF ARGUMENT

The opinions below, jurisdictional statement, questions presented, statutes and constitutional provisions involved and statement of the case are all as set forth in petitioner's original brief.

Since the respondents have not replied to the questions presented in petitioner's brief, we feel it necessary to set forth here the questions raised in respondents' briefs to enable an orderly reply to these arguments.

As petitioner sees the arguments of the respondents, they are:

1. Petitioner failed to argue in the court below the matters now presented to the Supreme Court.
2. Petitioner seeks to fashion a body of federal common law.
3. There is no need for uniformity in cases involving maritime death torts.
4. Petitioner has the same rights as all other Florida citizens and as is accorded the heirs of dead seamen under the Jones Act.
5. The pendency in the United States Senate of a bill to amend the Death on the High Seas Act should cause this Court not to grant relief to Mrs. Moragne.
6. The construction given the Florida Wrongful Death Act does not conflict with essential features of the maritime law.
7. Actions involving the wrongful death of longshoremen in navigable waters of the United States are maritime but local and, therefore, do not require uniformity of maritime law.

Since the above questions raised by the respondents are not responsive to the questions presented by the petitioner, petitioner is impelled to answer these questions as presented by the respondents in their briefs.

Petitioner points out to the Court, however, that the respondents have not responded to the issues raised by petitioner or by the Solicitor General, as amicus curiae, on the merits.

ARGUMENT

I.

CORRECTION OF ERRONEOUS STATEMENTS

Respondents in their briefs made the following erroneous statements to which petitioner points out the references in the record which disclose the error of these statements.

In the brief of respondent, States Marine Lines, Inc.:

(a) On page 9, respondent said:

> "The Petitioner presented the question to the Fifth Circuit as simply a question of interpretation of a Florida Statute."

Erroneous. See R. 19, 21, 45-56.

(b) On page 9, respondent said:

> "* * * the portion of the Fifth Circuit decision complained of here was invited and requested by Petitioner in its presentation of the appeal to the Fifth Circuit."

Erroneous. See R. 19, 21, 45-56.

(c) On page 15, second paragraph, respondent said:

> "* * * Petitioner has, under the Florida Wrongful Death Act, a cause of action for negligence identical with the one given a seaman's personal representative by the Jones Act."

Erroneous. In Florida under the common law a plaintiff does not have a cause of action for negligence *in whole or in part*, contributory negligence is a complete bar to recovery, and assumption of the risk and negligence of a fellow servant are defenses to the plaintiff's claim.

In the brief of respondent, Gulf Florida Terminal Company:

(d) On page 3, respondent said:

> "* * * Petitioner affirmatively sought construction of the Florida wrongful death statute by the Supreme Court of Florida."

Erroneous. See R. 19, 21, 45-56.

(e) On page 10, respondent said:

> "Petitioner's brief gives the impression that the doctrine of uniformity is all pervading and will not contenance application of any substantive or statutory law other than that declared by Congress or the Federal Courts."

Erroneous. See Petitioner's Brief pages 23-24.

II.

PETITIONER HAS NOT MISLED THE LOWER COURTS

Both respondents argue that petitioner failed to raise the questions now presented to this Court in the lower courts and

they cite the general rule that a party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the lower courts to make. *Safeway Stores v. Oklahoma Retail Groc. Asso.*, 360 U.S. 334, 79 S. Ct. 1196, 3 L. Ed 2d 1280 (1959); *Autrey v. Williams and Dunlap*, 343 F. 2d 730 (5th Cir. 1965); *Holm v. American Ship Building Company*, 276 F. 2d 201 (6th Cir. 1960), cert. den. 364 U.S. 819, 81 S. Ct. 53, 5 L. Ed. 2d 50 (1960); *Corbin v. Baltimore & O.R.R.*, 234 F. 2d 78 (6th Cir. 1956); *Williamson v. Weyerhaeuser Timber Co.*, 221 F. 2d 5 (9th Cir. 1955).

The decisions cited by respondents are not in point. The District Court felt and stated, R. 13-14, that it was in doubt as to its ruling dismissing plaintiff's claim for breach of the warranty of seaworthiness and invited an interlocutory appeal to the Court of Appeals for the Fifth Circuit. All of the questions presented to this Court, except the question whether *The Harrisburg* should be overruled, were fully briefed and argued in the Court of Appeals for the Fifth Circuit. R. 45-57. The question of overruling *The Harrisburg* is briefed and argued at the request of the Supreme Court and is not deemed by petitioner to be essential to a reversal of the Court of Appeals in this case. See petitioner's brief page 25. Although petitioner objected to certification by the Court of Appeals of the question involved to the Supreme Court, R. 19-21, petitioner did not consider it to be necessary or appropriate to raise the constitutional questions involved herein in the Florida Supreme Court.

III.

PETITIONER DOES NOT SEEK TO FASHION A BODY OF COMMON LAW

The respondent, States Marine Lines, Inc., throughout its brief, repeatedly states that it is Mrs. Moragne's conten-

tion that this Court should establish a body of uniform federal common law. Nowhere does Mrs. Moragne in her brief make any such contention. Mrs. Moragne asks the Court to apply *established* maritime law uniformly.

The shipowner, States Marine Lines, Inc., using a device commonly used in jury trials where no logical argument can be made in opposition to the merits of the case, sets up a "straw man" (here, federal common law) and then methodically strikes down the "straw man."

This case emphatically does not involve the common law, let alone "federal common law" which was laid to rest in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1925); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107 (1922); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910), have nothing to do with the instant case. Nor does the fact that this case is in the federal court by reason of diversity jurisdiction detract from the principle of law which is here in controversy. Whether this case were on the admiralty side of the federal court or in the state court or in the federal court by diversity jurisdiction cannot affect the question whether the State of Florida can fashion the duties and obligations applicable to a maritime tort which results in death when such duties and obligations so fashioned conflict with established maritime law.

The shipowner misleads this Court when it advises the Court on page 11 of its brief:

> "* * * that over 4,000 square miles of the surface of Florida, or roughly 8%, is covered by internal water."

Mrs. Moragne has never made the contention that maritime

law should apply to waters of the State of Florida which do not constitute navigable waters of the United States.

IV.

RESPONDENTS HAVE MISCONSTRUED PETITIONER'S ARGUMENT ON UNIFORMITY

Both respondents construe petitioner's argument to require absolute uniformity in all matters maritime. Petitioner respectfully points out that she has never taken this position. Petitioner's entire argument is premised upon the oft-repeated constitutional understanding that the states may "supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers*, (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903; *The City of Norwalk*, D. C., 55 Fed. 98. It is the position of Mrs. Moragne that Florida may not abolish the well-established duty of a shipowner to furnish a seaworthy ship to a longshoreman employed thereon in cases involving wrongful death; that this duty is thoroughly ingrained in maritime law and whether the seaman is injured or killed, the duty exists, the breach of which must furnish liability for death occurring on navigable waters of the United States; that the Florida Supreme Court may not ennunciate legal principles which conflict with or are "hostile to" the "characteristic features of the maritime law" which is so well established.

On pages 14-19 of the shipowner's brief, the shipowner, States Marine Lines, Inc., points to a number of cases which the shipowner contends involve situations in which uniformity is not required. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), is not in point because of the clear legislative history as pointed out in that case. *Puleo v. H. E. Moss & Co.*, 159 F. 2d 842 (CA 2,

1947); *Fonseca v. Prann*, 282 F. 2d 153 (1st Cir. 1960); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 63 S. Ct. 1067, 87 L. Ed. 1416 (1943); *Southern Pacific Co. v. Commonwealth of Kentucky*, 222 U.S. 63, 32 S. Ct. 13, 56 L. Ed. 96 (1911); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961); *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955); *Loveless v. Employer's Liab. Assurance Corp.*, 218 F. 2d 714 (CA 5, 1955); *Cooley v. Port Wardens*, 53 U.S. 299, 320, 13 L. Ed. 996, 1005 (1851); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252, 7 L. Ed. 412, 414; and *Mobile County v. Kimball*, 102 U.S. 691, 697, 26 L. Ed. 238, are not in point because none of these cases involved any state law which conflicted with existing federal maritime law. *Allen v. United States*, 338 F. 2d 160 (9th Cir. 1964) was grounded upon *The Harrisburg* and involved a statute of limitations problem. *Gillespie v. U. S. Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2nd 199 (1964) was grounded upon the pre-emption doctrine. Therefore, none of these cases cited by the respondent are in point on the proposition involved in this case, i.e. whether a state can declare state law applicable upon navigable waters of the United States which conflicts with established federal maritime law.

V.

PETITIONER DOES NOT HAVE A CAUSE OF ACTION FOR NEGLIGENCE IDENTICAL WITH ONE GIVEN A SEAMAN'S PERSONAL REPRESENTATIVE UNDER THE JONES ACT

The respondent shipowner, brief page 15, makes the flat statement that the petitioner has a cause of action for negligence under the Florida Wrongful Death Act identical with one given a seaman's personal representative under the Jones Act. Nothing could be further from the truth. Under

the Jones Act, negligence "in whole or in part," "negligence in the slightest degree" will support a verdict for the personal representative of a dead seaman. *Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 77 S. Ct. 443, 449, 1 L. Ed. 2d 493.

The requirement of casual relationship is relaxed under the Jones Act. *Kernan v. American Dredging Co.*, (1958) 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382. Contributory negligence is not a complete bar to recovery under the Jones Act. On the other hand, in Florida negligence must be proved by a preponderence of the evidence to be casually related to the death of plaintiff's decedent and contributory negligence in the slightest degree will bar recovery. There is, in fact, only the vaguest similarity between the seaman's right of action under the Jones Act in Florida and a plaintiff's action for negligence in Florida.

VI.

THE PENDENCY IN THE UNITED STATES SENATE OF A BILL TO AMEND THE DEATH ON THE HIGH SEAS ACT SHOULD NOT DEPRIVE MRS. MORAGNE OF RELIEF IN THIS CASE

Both respondents point to the pendency in the United States Senate of a bill introduced by Senator Warren Magnuson of Washington (S-3143 filed November 14, 1969) to amend the Death on the High Seas Act to become a general maritime death act. Both respondents suggest to this Court that the Court should not overrule *The Harrisburg or The Tungus* because of the pendency of this bill. Petitioner is advised by Senator Magnuson's office and the staff of the United States Senate Committee on Commerce that no hearings have been set on this bill, that it is not known whether hearings will be set during this session of Congress, and that action on the bill

will likely be a long time in coming. It is interesting to note that neither respondent suggests that it, or the industry of which it is a member, is supporting this bill or will support any similar legislation. In any event, ultimate passage of the bill cannot help Mrs. Moragne and her children.

On the other hand, petitioner suggests that this Court should certainly recede from the reasoning of the majority in *Tungus* which has resulted in the unfortunate holding in *Moragne* and that this Court might and should overrule *The Harrisburg* and call the attention of Congress to the need for a general uniform maritime death act.

VII.

THE CONSTRUCTION GIVEN THE FLORIDA WRONGFUL DEATH ACT BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ADOPTING THE INTERPRETATION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE ESSENTIAL FEATURES OF MARITIME LAW

Clearly, under maritime law applicable to torts occurring upon vessels on navigable waters of the United States, the owner of a ship owes to longshoremen a warranty of seaworthiness of the vessel upon which they are employed. This duty is rooted in maritime law and applied uniformly to those persons entitled to the warranty who are injured. Now respondents contend, and the Florida Supreme Court has held, that this duty to supply a seaworthy vessel is extinguished when the injury which results from a breach of this duty ends in the death of that person. Thus, Florida has established a rule of law which is 180 degrees contrary, and precisely opposite to the maritime duty to furnish a seaworthy vessel upon navigable waters of the United States and, therefore, violates the essential characteristics of maritime law.

VIII.

THE MARITIME BUT LOCAL DOCTRINE DOES NOT APPLY IN THIS CASE

The maritime but local doctrine has sometimes been misused and respondents would have this Court re-enunciate this doctrine in a situation where it is not applicable. The essence of the maritime but local doctrine supposes first that neither Congress or the federal courts have occupied a field of maritime law, and second that the states may act in this field in a way which is not contrary to nor in conflict with maritime law.

To show the error of respondents' position, let us assume that Florida law may fully occupy the field of recovery for wrongful death in the absence of a federal wrongful death statute. What then becomes of federal laws relating to limitation of liability? If the Florida law on wrongful death is pervasive and superior, then surely the respondents should not be entitled to the federal maritime rule which entitles them to limit their liability to the value of the vessel and pending freight. Of course, such is not the law and the maritime doctrine of limitation of liability is applicable to a disaster involving maritime death upon navigable waters of the United States within the territorial limits of Florida. *Just v. Chambers*, (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903.

For another example, assume that the death of a longshoreman upon navigable waters of the United States within the territorial limits of Florida is caused by an unseaworthy stowage of cargo performed by a stevedore in the port of New York. May the longshoreman's beneficiaries bring this action in New York against the stevedore who was not the employer of the longshoreman and the vessel whose unseaworthiness ultimately resulted in his death in the State of Florida? If so, does not the doctrine of unseaworthiness apply in New York?

If the suit were brought in Florida, does it apply under Florida law? Can it be said then that the issues in such a case are maritime but clearly local? The issue in this case to be decided by the Supreme Court is not local but is inextricably interwoven with the maritime commerce between the states and with foreign nations.

IX.

TO OVERRULE THE HARRISBURG WOULD NOT CREATE A LEGAL JUNGLE

The shipowner suggests, brief 19-21, that if the Court overrules *The Harrisburg* a legal jungle would be created and suggests numerous questions which it contends would trouble the courts for years. Petitioner does not see such a troublesome problem.

For example, taking the questions as set forth by the shipowner, petitioner seeks to answer these questions very simply.

(a) Identification of Beneficiaries:

1. In whom does the action vest?

A. In the personal representative as provided under the Jones Act and the Death on the High Seas Act.

2. Are children to share with widow?

A. Yes, as provided by applicable existing law.

3. Are adoptive children to share?

A. Yes, as provided by existing law.

4. Are stepchildren to share?

A. Yes, if dependent upon the decedent.

5. Are collateral relatives to share?

A. Yes, if dependent upon the decedent.

6. Do personal representatives share?

A. Yes, for loss to the estate as under existing law.

7. What happens upon disqualification of preferred beneficiaries?

A. Handled as under the Jones Act and Death on the High Seas Act.

8. What happens upon death of a beneficiary?

A. Handled as under the Jones Act and Death on the High Seas Act.

(b) Harmony with Survival Act Procedure:

1. Does result of Survival Act Suit affect wrongful death claim?

A. No. The two are mutually exclusive as to damages.

2. Must the suits be joined?

A. No. This presents no problem under existing law.

3. Damages recoverable under respective suits must be mutually exclusive.

A. Yes.

(c) Damages Recoverable:

1. Should there be a monetary limit?

A. Why should there be? There are none under the Jones Act or under the Death on the High Seas Act.

2. Who recovers decedent's pain and suffering?

A. The personal representative.

3. Are grief and mental anguish recoverable; by whom?

A. Yes. By the spouse and minor children who have suffered same.

4. What about loss of advice and companionship?

A. Recoverable as under the Jones Act for loss of nurture.

5. What if beneficiary negligently contributed to death?

A. How could they in a maritime death?

6. What consideration is given receipt of pension benefits, insurance proceeds, or share of estate by beneficiary?

A. The same as is presently given under the general law of damages applicable in the state and federal courts.

7. Which parent, if either, controls claim for death of a child; what elements of damages are recoverable in such action?

A. As under existing law the parent who has custody of the child and the elements of damages generally recoverable for such death.

(d) Conduct Imposing Liability:

1. Should liability be based on fault concepts only?

2. Should fault-blind compensation come from funds publicly administered or from private litigation?

A. No problem is imposed under existing law on these questions and petitioner suggests that the shipowner raises the questions in an excess of exuberance.

The shipowner further suggests that this Court might become involved in construing local laws of testate and intestate succession, local tax structure, local civil actions paralleling the death act, and local statutes and systems providing the receipt of collateral funds because of the death. Petitioner is not familiar with the laws of other states but can state categorically that no such problems exist in the State of Florida and that petitioner has never had any such problem arise in causes of action for death arising either under the Jones Act or the Death on the High Seas Act. Petitioner does not see a specter of problems arising from overruling *The Harrisburg* such as is suggested by the shipowner. The shipowner suggests, brief page 22, that it is no undue burden on petitioner to be bound as is every other Floridian by the laws of Florida and that petitioner should not be entitled, for example, to the same rights she might obtain in the State of Virginia. It is, of course, obvious that the same argument could be applied to seamen, to ships or any other maritime entity.

The fact is that the Constitution of the United States extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction and the Supreme Court has consistently held that while the states may supplement maritime law they may not fashion a law which is different, hostile or inconsistent with substantive maritime principles. This is precisely what the Florida Supreme Court has done in the instant case and the Court of Appeals for the Fifth Circuit felt bound by the opinion of the Florida Supreme Court pursuant to the majority rule established by this Court in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524.

CONCLUSION

The respondents have failed to address themselves to the primary issue in this case. They have raised false or irrelevant

collateral issues not material to the basic issue raised by the petitioner. The questions presented to the Court in this case are whether Florida may establish substantive maritime law applicable to maritime torts occurring upon navigable waters of the United States resulting in death which conflict with substantive federal maritime law; and whether the rule of *The Harrisburg* adopting a common law rule which has been universally abrogated and is celebrated in its denunciation, should now be overruled. Petitioner urges the Court to recede from the majority reasoning in *M/V Tungus v. Skovgaard* and to overrule *The Harrisburg*. Petitioner concludes that the Supreme Court should reverse the decision and judgment of the Court of Appeals for the Fifth Circuit in this case.

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CERTIFICATE OF SERVICE

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